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Nos. 97, 98 and 99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

BOSTON AND MAINE RAILROAD, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLEES, THE NEW YORK CENTRAL RAILROAD COMPANY, THE DELAWARE AND HUDSON RAILROAD CORPORATION, ERIE-LACKAWANNA RAILROAD COMPANY, GRAND TRUNK RAILWAY SYSTEM—LINES EAST, AND THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY.

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Questions Presented

1. Whether the District Court correctly held that the Interstate Commerce Commission acted erroneously and without rational basis as a matter of law in holding it unlawful under Section 3(1) of the Interstate Commerce Act for Appellee Railroads voluntarily to reduce their rates on export-import traffic through North Atlantic Ports served by them in order to equalize those rates with the export-import rates of competing railroads serving other North Atlantic Ports,

with consequent equalization of total rail-ocean freight charges.

2. Whether the District Court properly set aside and enjoined, without remand, enforcement of an order of the Interstate Commerce Commission cancelling such voluntary rate reductions as unlawful under Section 3(1), having concluded that the order of the Commission was erroneous and without rational basis as a matter of law.

Introduction

Appellee Railroads in this case seek to eliminate the last major railroad rate obstruction to the free flow of commerce between the interior of the United States and the rest of the world. The obstruction results from differentials in railroad freight rates which were devised 86 years ago and have long since become obsolete. Appellee Railroads have voluntarily filed schedules of reduced rail rates to eliminate those obsolete differentials.

In the 1870s freight rates on ocean steamers varied according to the distance travelled. Since ocean distances were greater from Europe to Baltimore and Philadelphia, ocean shipping costs were higher at those ports than at New York and Boston. To compensate for those differences, differentially higher rail rates on export-import traffic were established between interior points in the United States and the ports of Boston and New York. The result was that Midwest and foreign shippers had a wide choice of railroads and ports at the same total transportation cost. The railroads involved likewise had an equal opportunity to compete for the traffic.

Gradually, over the years, ocean rates to these American ports became equalized. Meanwhile equal rail-ocean charges were established generally from the interior through the South Atlantic Ports, the Gulf Coast Ports and the major ports of the Pacific, all regardless of distance.

There remain the ports of the North Atlantic from Hampton Roads, Virginia to Portland, Maine. Ocean rates have now been equalized to those ports since 1935 and rail differentials lost their purpose at that time. Nevertheless, the higher rail rates of the Appellee Railroads have persisted down to the present day and have had a serious impact on the competitive position of these important carriers.

The rail rates proposed in this case are designed to wipe out a vestigial remnant of Nineteenth Century differentials whose demise has long been overdue.

Statement

Prior to 1877 higher ocean freight rates to ports more distant from Europe were the cause of frequent railroad rate wars in the competitive struggle for export-import traffic between the Midwest and Europe (R. 3839). Since ocean rates were higher to Baltimore and Philadelphia than to Boston and New York (R. 3744)* the rail carriers to the Southern Tier Ports cut rates in an effort to equalize the through shipping costs

* Today Baltimore and Philadelphia, together with Hampton Roads (including Norfolk) are known as the Southern Tier Ports. Boston and New York, together with Portland, Maine and Albany, N. Y. are known as the Northern Tier Ports. Both sets are within the North Atlantic seacoast.

to Europe. The Northern Tier Railroads retaliated and chaos often resulted.

Finally, in 1877, in order to substitute stability for rate wars and to provide shippers a free choice of ports, the railroads entered into an agreement to maintain rail differentials from interior points which would equalize the overall rail-ocean charges through all the North Atlantic Ports (R. 3839).*

After several years of actual experience under equalized rates, the entire matter of the rate structure was placed in the hands of a distinguished Advisory Commission.** On July 20, 1882 it filed a sixty-page "Report Upon Differential Rates", known as the Cooley Report (R. 1627). Because of its breadth of vision and depth of scholarship, this report has so commended itself to the courts and the Interstate Commerce Commission that it has served as a basic charter in this area of transportation thought ever since.

The Cooley Commission undertook to analyze the weight which should be given to factors of cost, distance and competition in determining these rates.

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* The interior points to and from which the rail-ocean charges were equalized are referred to in this case as the Affected Territory. It corresponds roughly to what is known as the Central Freight Association Territory and covers primarily the States of Illinois, Michigan, Indiana, Ohio, and portions of southern Wisconsin and of western Pennsylvania (R. 3740).

** The Commission consisted of Allen G. Thurman, who served as a member of the Ohio Supreme Court and also as a United States Senator; Thomas M. Cooley, who later served as the first Chairman of the Interstate Commerce Commission and as Chief Justice of the Michigan Supreme Court; and Elihu B. Washburne, who served as a Member of Congress and as Secretary of State of the United States (R. 1620).

(R. 3747). It concluded that neither cost nor distance should control, but that in the final analysis, equality of competitive opportunity was the decisive factor (R. 3747). Upon the basis of the ocean rate differentials then prevailing, the Cooley Commission found that substantially equal through rates to Europe would be accomplished by differentially higher rail rates to New York and Boston by 2¢ per hundred pounds over the rates to Philadelphia and 3¢ over the rates to Baltimore (R. 1662).

Prophetically, the Cooley Report foresaw the day when these differentials would disappear (R. 1666):

> "But we do not assume that the rates which are just to-day will be just indefinitely. * * * Whenever they shall be found to operate unfairly, and to give a force or unnatural direction to trade, and whenever it shall appear that they tend to deprive any one of the seaports affected by them of the proportion of business that would naturally come to it under the operation of normal competition, the want of equity in the rates will appear, and it will be right to modify, or, perhaps, abolish them."

The rate differentials thus confirmed continued generally until the present day, a period of eighty-six years (R. 3744). However, as the Cooley Commission foresaw, the reasons for the differentials began to disappear in the early 1920s, and by about 1935 the ocean rates to and from the North Atlantic Ports were equalized (R. 3745). But the rail differentials continued on. As a result rail-ocean charges through the Northern Tier Ports exceeded those through the Southern Tier Ports by the amount of the rail differentials

(R. 3745). The essential foundation of competition by equal total rail-ocean rates was thus destroyed (R. 3745).

This disruption of rail-ocean rate equality has now become disastrous for the Northern Tier Railroads and Ports. Except for the periods of World War II and the Korean War, the traffic carried by Appellee Railroads between Affected Territory and the Northern Tier Ports steadily dwindled to the point where they now have left only 24% of the export-import traffic as against 76% for the Appellant Railroads (R. 3820).

Two of the Appellant Railroads, the Pennsylvania and Baltimore & Ohio, serve both the Southern Tier Ports and the Port of New York. Of the total traffic carried by both Appellee and Appellant Railroads between Affected Territory and the North Atlantic Ports, two-thirds moves through the Southern Tier Ports and only one-third through the Northern Tier Ports (R. 3819). Correspondingly, the financial condition of Appellee Railroads has been steadily going from bad to desperate (R. 3813; *infra*, p. 46).

Ocean rates for all other sections of the American seacoast are generally equalized, within those respective sections. Correspondingly, railroad rates are equalized under the express or tacit sanction of the Commission (R. 1886, 3749). Thus, these rail-ocean charges are equalized from the interior through the ports on those coasts. Railroad rates to the North Atlantic Ports remain to be equalized.

Railroads can compete on equal terms for traffic from the Midwest and the East to all the major West Coast ports from San Diego to Vancouver, B. C.,

regardless of distance. Equality of rates from Central territory is similarly established to the Gulf Coast ports from Corpus Christi on the west to Tampa, Florida on the east, regardless of distance. There is similar equality to the South Atlantic, from Jacksonville, Florida to Morehead City, North Carolina, also regardless of distance (Appendices A and B).

This Court has already compelled the Commission to recognize the right of the Northern Tier Railroads to equalize rail rates to all North Atlantic Ports with respect to export grain shipped from Buffalo after arrival there via the Great Lakes.* Similar equalization to the Affected Territory for import iron ore has been proposed and is still in litigation.

Unlike so many of the early Commission cases, this is not a "port case" where a port filed a complaint to compel a railroad to change rates. These rate reductions were voluntarily proposed in June, 1956, as a matter of managerial discretion by Appellee Northern Tier Railroads. The proposed rates are on the same basis as those of competing railroads serving Baltimore and Hampton Roads (R. 3739). They seek to restore the traditional equality of total rail-ocean rates from Affected Territory through the North Atlantic Ports (R. 3745). Equality for shippers, railroads and ports alike is the objective.

This basic competitive principle of equal through rates on export-import traffic is the crucial element of

* The proposed rates involved in the present case are not concerned with Buffalo ex-lake grain, since it does not involve rail shipment from Affected Territory. The proposed rates apply to all export-import rail traffic to and from Affected Territory except iron ore, coal, and coke made from coal.

this case. It was established in 1877, articulated by the Cooley Report, defended by the Interstate Commerce Commission in case after case for sixty years and advanced and strengthened by Acts of Congress, including the 1935 Amendment to Section 3(1) designed to prevent undue preference or prejudice between ports.

The principle was recognized and restated by the Commission in its decision in this case and ignored in the result. The District Court observed the basic principle and found that the Commission had no rational basis for ignoring it.*

Summary of Argument

I

The only question of substance on this appeal is whether the District Court correctly held as a matter of law that the Commission acted erroneously and without rational basis in finding the rates proposed by Appellee Railroads unlawful under Section 3(1) of the Interstate Commerce Act. Both the Commission and the District Court considered the sole issue to be one of rate relationships under Section 3(1).

The transportation standards governing export-import rate relationships have long been recognized to

* After Appellee Railroads published their reduced rates, the Appellant Southern Tier Railroads published retaliatory reductions in rates, designed to recover their preferential rate relationships (R. 3739). These were challenged by Appellee Railroads and the Commission found that the proposed retaliatory rates were "not shown to be just and reasonable", ordering them to be cancelled (R. 3807). No appeal was taken by Appellants from this order.

be different from those applicable to domestic rates. In the case of export-import traffic, rail rates are only a part of the total charge for transportation between the interior of the United States and foreign points. As far back as 1877, when the rail differentials here involved were first established, it became clear that equalization of total rail-ocean charges was the sound basis for export-import rail rates. Under equalization, stability of rates was substituted for the chaotic rate wars which had plagued the railroads. This enabled railroads and ports alike to compete for more traffic by improving their service and facilities. At the same time it provided shippers with a wide choice of ports in foreign commerce instead of funneling all the traffic through the port with the lowest rate.

Over the years the soundness of this basic principle has been reviewed and reaffirmed many times in the light of actual experience—first by the Cooley Commission in 1882 and time after time since then by the I.C.C. and the courts.

The Commission in the present case reaffirmed that the purpose of the rail differentials was to compensate for differences in ocean charges. It also recognized that ocean rates became equalized by 1935 and rail-ocean equalization was then disrupted. It reaffirmed that port rates are not distance rates and that distance has characteristically been disregarded in port adjustments. It conceded that in the other coastal areas of the country equalization has prevailed, with disregard of distance differences vastly greater than those here involved. It presented as the "best evidence" of traffic ratios a study showing that Appellee Railroads have

only one-fourth of the relevant traffic and Appellants three-fourths. After all this, the Commission abruptly concluded as a matter of law that because of the relatively minor distance factor the equalizing rates proposed by Appellees could not be approved without violating Section 3(1).

The Commission here attempted to perform the forbidden function of "an umpiring role over the fate of cities". Its departure from established concepts of export-import rate making plainly reflected an effort to allocate prosperity among ports. This is evident from the irrelevant and extraneous circumstances on which it relied heavily. These included comparisons of the natural endowments of the ports and their harbors; comparisons of the brokerage, banking, consular and other services available at the ports; comparisons of the facilities available through public expenditure and private enterprise at the ports; and comparisons of the total commerce passing through the ports, regardless of any connection with the Affected Territory or even whether the traffic moved by rail.

Emphasizing these irrelevancies the Commission held unlawful a managerial decision by Appellee Railroads to compete for an improved traffic position by conforming to a pattern of rail-ocean equalization already in effect on all other coasts. As the District Court held, the decision was erroneous and without rational basis as a matter of law.

The validity of the Commission's order cancelling the retaliatory rate proposals of the Appellant Rail-

roads was not put in issue before the District Court. Appellants did not appeal the Commission's finding that their proposed rates were not shown to be just and reasonable. Therefore the District Court did not deal with them, and they are not in issue on this appeal.

The argument that the rates proposed by Appellees were unlawful because Appellants subsequently retaliated by threatening a rate war is untenable on its face. If the proposed rates were lawful when published, later retaliatory conduct by another could not make them unlawful. In any event this Court has held that the threat of a rate war is illusory since the Commission has ample power to stop it when and if it develops.

II

The District Court properly set aside and enjoined the order of the Commission since remand was neither requested nor necessary nor useful with regard to either Section 1(5) or Section 3(1).

Appellees established by familiar methods of proof before the Commission that the proposed rates would be compensatory and therefore just and reasonable. The proof showed that the reductions were minimal, and that revenues would still be almost double the national average for all Class I railroads. Specifically, in the case of the New York Central, the revenues would be about double the average of all its other freight revenues. The cost evidence also showed that Appellees' rates would be compensatory.

In the light of this evidence, the Commission found no basis for a finding adverse to Appellees under Section 1(5). It therefore rejected the recommendation of the Hearing Examiner that it find the rates not shown to be just and reasonable.

A remand for reconsideration of the issue under Section 3(1) has been suggested by the United States alone. No appellant has joined in the request. The principal reason offered for the request is that the Commission might explain why it suddenly departed in this case from the standard of rate-making applied in all other export-import rate cases and endeavored to use power over railroad rates to interfere with the opportunities of ports to realize their natural advantages.

For nearly seven years this important managerial decision regarding rates has been prevented from going into effect. The Commission has already had two opportunities to deal with it. The basic rights and obligations are clear. Remand for unnecessary clarification of details, and purposeless explanations by the Commission, would be a grave injustice to Appellees.

At no time in the District Court did any party remotely suggest remand by the District Court to the Commission. The District Court found that Appellees had made a *prima facie* showing that the proposed rates were just and reasonable, and that the Commission's application of Section 3(1) lacked any rational basis. In setting aside the Commission's order, without remand, the District Court exercised its proper statutory function and followed the precise procedure approved by recent decisions of this Court.

ARGUMENT

I.

The District Court correctly held as a matter of law that the Commission acted erroneously and without rational basis in finding the equalizing rate reductions proposed by Appellee Railroads unlawful under Section 3(1) of the Interstate Commerce Act.

A. The Issue Before This Court Is Whether the District Court Erred in its Determination of the Legal Principles to be Applied to the Action of the Commission under § 3(1).

The only question of substance on this appeal is whether the District Court was correct in its determination of the legal principles governing its decision that the action of the Commission in cancelling the proposed equalizing rate reductions under Section 3(1) was without rational basis.

The Commission found that "the sole issue is one of lawful rate relationships" (R. 3753).

In its brief to the District Court, the Commission spelled out the issue in the same way and represented that it was "the sole question presented" (Br. p. 2).

The Maryland Port Authority and other Appellant Intervenors in their brief to the District Court said this is "the real issue in this case" (Br. p. 14).

Concerning the decision of the Commission, the District Court held: "Its final decision rests solely on the proposition that some ports would be unduly preferred and others unduly prejudiced by the proposed rates." (R. 4682)

The Commission more than once indicated its view that there was no *bona fide* doubt that the rates met the test of Section 1(5). Early in the proceeding, Appellant Railroads made a formal request for a study by the Commission of the costs of Appellee Railroads, basing it on the asserted existence of an issue as to whether the proposed rates of Appellee Railroads were compensatory. The Commission denied the request as "not warranted" (R. 59).

In his Report the Hearing Examiner recommended a finding that the rate reductions proposed by Appellee Railroads were not shown to be just and reasonable under Section 1(5) (R. 3729). The Commission refused to adopt that recommendation and cancelled the proposed rate reductions solely on the ground that they would result in undue prejudice and disadvantage to the Southern Tier Ports in violation of Section 3(1). (R. 3797, 3806, 3807).*

The Appellants inject an irrelevant consideration when they rely on the power of the Commission to "prescribe" minimum rates. This is a non-existent issue. The proceeding before the Commission was an investigation and suspension proceeding under Section 15(7) of the Act to determine whether rates voluntarily proposed by carriers were lawful. It was not a proceeding under Section 15(1) for the purpose of prescribing rates. The difference is important. Under Section 15(7) the Commission exercises the quasi-judicial function of determining whether rates proposed by a carrier are within the zone of reasonableness and otherwise

* The disappearance from the case of the issue under Section 1(5) is discussed in further detail in Point II below.

lawful.* Under Section 15(1) the Commission acts in a quasi-legislative capacity, taking over the rate-making function from the management of the carrier and itself prescribing the rates.

All parties recognize, of course, that the Commission has power to prescribe rates, as provided in Section 15(1), in a proceeding under Section 15(7). But that is of no relevance at all here.

In the present case the Commission did not purport to prescribe any rates. And even if it had purported to prescribe rates, it would have had no power to do so unless it had first correctly found that the rates Appellee Railroads had proposed were unlawful under Section 3(1).** Reliance by Appellants on the prescriptive power of the Commission begs the whole question. It merely brings the argument back to the sole issue presented: Did the District Court err in finding that there was no rational basis for the Commission's decision that the proposed rates were unlawful under Section 3(1)?

* This Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 506 (1935) and again in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 at page 460-61 (1945), declared:

> "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself."

** It is a fundamental premise of the Interstate Commerce Act that the carrier retains the primary right to set rates, and that the Commission may prescribe rates only after a valid finding that the rates proposed by the carrier are unlawful. This is so clear on the face of the Act, and has been held by this Court so many times, that extended discussion of the point is unnecessary. *I.C.C.* v. *Louisville & N. R. Co.*, 227 U.S. 88, 92 (1913); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935); *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949).

The same confusion reappears in different semantic attire when the Appellants argue that the issue below was not whether carriers might voluntarily equalize rates but whether "enforced equalization" of rates could be compelled (Appellants' Brief in No. 98, p. 5, and in No. 99, p. 7). The District Court did not purport to compel anyone to adopt any rates. "Enforced equalization" is an invention of the Appellants' briefs. The sole issue before the District Court was whether the cancellation of the Appellees' proposed rates was supported by a rational basis.

Neither the Commission nor the District Court purported to order any "enforced equalization" of rates. There was never any effort to prescribe rates for either the Appellee or Appellant Railroads. The proceeding involved a determination as to the lawfulness of rates voluntarily proposed by Appellee Railroads. The District Court held that there was no rational basis in the record for the decision of the Commission that those rates were unlawful. The sole question before this Court is whether the District Court erred in so holding.

As the District Court pointed out (R. 4004), there is a sharp distinction between rates which a carrier may voluntarily set in equalizing competition and rates which the Commission could require it to adopt.*

* *New York C. R. Co. v. United States*, 99 F. Supp. 394, 398 (1951); *aff'd per curiam sub nom. I. C. C. v. New York C. R. Co.* 342 U.S. 890 (1951); *Seattle Traffic Ass'n v. Consolidated Freightways, Inc.*, 306 I.C.C. 87, 93-94 (1959). Hence the complaint cases cited by Appellants in which the Commission refused to compel elimination of the North Atlantic port differentials are not in point. It may also be noted that most of those cases arose prior to 1935 before the ocean rates which the differentials were designed to offset had become equalized. The cases cited by Appellants are analyzed in Appendix C annexed hereto.

The District Court agreed with the finding of the Commission that equalization of rail-ocean charges has characteristically been the overriding consideration in the setting of export-import rates. It agreed with the finding that rail distance differences have been a minor factor and almost universally disregarded in the setting of such rates. It agreed with the Commission when it reaffirmed one of its oldest principles—that "in the public interest, the rates should be so adjusted 'that all the ports and the various lines serving them may freely compete for this traffic.'" (R. 4003, 3773)

The District Court reviewed the 4,000 page record and found these and other relevant findings fully supported by the evidence. It disagreed, however, with the Commission's abrupt disregard of its own findings in concluding as a matter of law that Section 3(1) made unlawful a competitive decision by carriers to conform their rates to a pattern of equalization which prevails in every coastal area of the country except the North Atlantic, and until about 1935 obtained in the North Atlantic as well.*

This Court is presented solely with a question of law: whether the District Court was correct in its determination of the applicable legal principles.

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* The briefs of the Commission (Br. p. 9) and of the United States (Br. footnote p. 47) suggest that the District Court held that, because this was not a complaint case, the Commission had no power in a proceeding under Section 15(7) to determine the issue under Section 3(1). There was no such holding. The District Court simply recognized the fact that in cases of this kind neither the courts nor the Commission had ever given controlling weight to factors of cost and distance; and the Court decided the case under Section 3(1).

This is so for two reasons:

In the first place, the essential controversy in the District Court was not over the relevant facts but over the legal principles governing the conclusions to be drawn under a proper application of Section 3(1).

Secondly, under the scope of review established by this Court, the sifting of the voluminous record to test the evidence against those legal principles was the function of the District Court as the initial reviewing court. Hence, if the District Court was correct in its determination of the legal principles, its decision should be affirmed. This Court has recently held:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."*

The Appellants lay great stress on the administrative expertise of the Commission. There is no need here to rebut lengthy arguments of the obvious. Of course all agree that determinations of fact in rate cases are entrusted initially to the administrative expertise of the Commission. But the function of ad-

* *N. L. R. B.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951). The many other cases to the same effect include *Universal Camera Corp.* v. *N. L. R. B.*, 340 U.S. 474 (1951); *N. L. R. B.* v. *American Nat. Ins. Co.*, 343 U.S. 395 (1952). In the cases cited, this Court was reviewing decisions of a Court of Appeals, but the rule is of general applicability whether the initial reviewing court be a Court of Appeals or a three-judge District Court. *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 578 (1952); *Thompson, Trustee, Missouri P. R. Co.* v. *United States*, 343 U.S. 549 (1952). See also *Radio Corp. of America* v. *United States*, 341 U.S. 412 (1951).

ministrative expertise in this case has been performed —not once, but twice. The facts are clear and the relevant findings of fact made by the Commission are clear. Where the Commission went astray was in applying the law and reaching conclusions without rational basis. The District Court corrected the error and should be affirmed.

B. The District Court Correctly Held that on the Relevant Facts Found by the Commission and the Undisputed Evidence, the Commission's Decision that Appellees' Proposed Rates Were Unlawful Under Section 3(1) Was Without Rational Basis.

Transportation standards and principles for rate-making vary in accordance with the types of commodities involved, the relevant rate structure, whether the traffic is purely domestic or bound for foreign ports, and whether it involves the immediate hinterland of a domestic port or Affected Territory. Different factors enter into the questions of fact and law in each area. This case concerns only rail rates involved in commerce between the Affected Territory and foreign ports, and specifically rates which may be voluntarily set by the railroads in order to compete, as distinguished from those which the railroads may be compelled to adopt.

1. Historical Background

The basic principles here involved were established nearly a century ago by the agreement of 1877 between the railroads serving the North Atlantic ports. This equalization of rail-ocean rates was submitted to the Cooley Commission for study. It held extensive hear-

ings in the various cities involved. Its Report, referred to above, gave thorough consideration to the weight to be given to costs, distance and competition in determining export-import rail rates. It found that neither costs nor distance was the governing factor and that equality of competitive opportunity was the controlling consideration. To this end, it concluded that the principle of equalization of through ocean-rail rates was sound and should be continued (R. 1627-1667). In the case at bar, the I.C.C. said of the Cooley Report (R. 3747):

> "Of the three principles referred to in that report, mentioned variously by the parties as controlling these port relationships; that is, the distance principle, the cost principle, and the 'competitive' principle, the last named was found to be the true one * * *, not only from the standpoint of their local interests but in the interest and welfare of the people of the nation as a whole. This principle of 'competitive opportunity', * * * appears to have been the norm used in testing the soundness of the differentials from their inception."

The Cooley Report gave its reasons as follows (R. 1662):

> "But when so treated, the Atlantic cities become merely so many points on so many through routes between the interior of the country and the European ports, and the charges on shipments must regard the whole lines and not parts of them merely. On these several through lines, competing for the same business between the same interior American towns and the foreign ports, the whole charges, if the routes are equally favorable, must be substantially the same, or the one giving the best rates would obtain the business. The question

> of ocean rates must, therefore, have an important bearing on the inland rates; for if the ocean rates are greater from Baltimore to foreign ports than from New York to the same ports, the inland rates to Baltimore must necessarily be lower, or Baltimore will be excluded from the trade."

The equalization of rail-ocean through rates thus established prevailed and the principle operated successfully for more than half a century.

As the I.C.C. found in this case (R. 3745):

> "The differentials were designed and their effect was, to compensate for the differences in these ocean rates in favor of the northern tier points. Thus, they tended to produce equal total transportation charges between an interior point and the foreign origin or destination over all routes through the several ports, affording the different railroads and the ports competitive rates."

It was not until 1935 that equalization of ocean rates was completed and the reason for the rail differentials was gone. The Original Report of the Commission in this case found that (R. 3745):

> "Beginning in the early twenties and extending to about 1935, the ocean rates to and from the different ports were equalized. Consequently, the sum of the rail and ocean transportation charges through the northern tier ports * * * became higher than the sum of those charges through the southern tier ports served by the protestants, by the amounts of the above differentials."

The Appellants repeatedly assert that ocean rate differentials disappeared late in the Nineteenth Cen-

tury or at the latest, early in the Twentieth Century. From this they argue that the rail differentials must have been maintained during all the intervening years for some reason other than ocean rate differences. On this assumption they launch a major attack on the District Court for its holding that differences in rail distance have never been a controlling factor in fixing rail rates on export-import traffic.

The difficulty with this argument by Appellants is that its basic assumption is wholly contrary to the finding of the Commission whose decision they seek to uphold. It is true that in some port complaint cases as early as 1898 and as late as 1925 there is language in Commission reports indicating that the usually fluctuating ocean charges had become temporarily equalized in the case of some of the ports (e.g., *Chamber of Commerce of N. Y. v. N.Y.C. & H. R. R. Co.*, 24 I.C.C. 55, 674 (1912); *Export and Domestic Rates*, 8 I.C.C. 214, 227 (1899)). It is these cases upon which Appellants rely. They do not alter the basic fact found by the Commission that the whole purpose of establishing the rail differentials was to offset the ocean differentials. Moreover, it appears that the moments of partial and temporary stabilization were so brief that the Commission was wise in ignoring them, as subsequent history disclosed.

The ultimate fact is that ocean rates were not finally equalized until 1935, as the Commission found. See also *New York C. R. Co. v. United States*, 207 F. Supp. 483, 487 (S.D.N.Y. 1962). There is no substance therefore to the argument that rail distance differences or some other undisclosed factors must have

led the Commission to continue the rail differentials prior to 1935. Until that time the ocean rate differences required the rail differentials. The early cases cited by Appellants are analyzed in Appendix C hereto.

The impact of ocean rate equalization, completed in 1935, was not immediately felt. World War II intervened, bringing a vast concentration of shipping to New York. With the return of peace, the decline in traffic continued. It became substantial by 1949. R. 3734; *New York C. R. Co.* v. *United States*, 99 F. Supp. 394 (D. Mass. 1951), *aff'd per curiam sub nom., I.C.C.* v. *New York C. R. Co.*, 342 U.S. 890 (1951). It was only after the conclusion of the Korean hostilities that the full and devastating impact of continuing rail rate discrimination was felt.

By 1956 the Appellee Northern Tier Railroads had lost export-import traffic to and from the Affected Territory at such a rate that they were reduced to 24% of the whole as compared with a total of 76% carried by the Southern Tier Railroads (R. 3820). Including the traffic moved through the Northern Tier Ports by Appellants Pennsylvania and Baltimore & Ohio Railroads, the total share of all relevant traffic between Affected Territory and the Northern Tier ports was 33% compared with 67% for the Southern Tier Ports (R. 3819).

2. Competition, Not Distance, as the Governing Legal Standard for Export-Import Rates

The Cooley Commission rejected cost and distance as controlling factors, finding the true basis for export-import rail rates in the principle of competition (*supra*,

p. 20). Until the present case, and since, the I.C.C. has consistently followed the principles of the Cooley Report. It pays respectful obeisance to factors of both distance and cost and then proceeds to base its decisions upon the essentials of equal, competitive through rates.

Distance and cost may be significant factors in fixing some domestic rates, but they are not controlling in determining rail export-import rates.* Railroads are subject to harsh rules of competition, the same as are all other business enterprises. In rail-ocean commerce, the ultimate destination is overseas and rail carriage to and from ports is only part of the total costs.

Thousands of traffic managers with sharp pencils, on both sides of the ocean, are dedicated to finding the most economical way of shipping goods in fiercely competitive world trade. Every penny is counted, and those business enterprises which cannot compete will die. Likewise, when railroads cannot compete—or are not allowed to compete—they also die.

As early as 1905 the I.C.C. itself made it clear that it considered equality of competitive opportunity to be the decisive factor in determining export-import rail rates:

> "The real question is on what basis shall rates be equalized through the various ports. * * * The

* Although domestic rates ordinarily reflect differences in short-line distances, the rate over all competing routes between any two given points is generally the same, regardless of distance, to enable the carriers to compete. If the rate were higher over the longer route, that route would never be used if avoidable. For the same reason the competitive principle requires equalization of export-import rates through competing ports. *See, e.g., Grain and Grain Products*, 205 I.C.C. 301, 380-382 (1934); *aff'd* 215 I.C.C. 83, 104 (1936).

through rate is made by adding together the inland rail rate from the interior to the port of export and the water rate from the port of export to the foreign destination. * * *

"The purpose is to permit these carriers and the ports which they serve to compete for this traffic. The rates are to be so adjusted that there can be fair competition for this business via all the ports, so that no one shall possess a distinct advantage over the other."*

Competitive rail rates in rail-ocean traffic are not distance rates. They are merely part of the through charge between the Affected Territory and foreign ports. It was natural therefore that in the present case the Commission should have found:

"It is apparent that considerable disregard of rail distances is characteristic of all port adjustments, as it was in the establishment of the rates here dealt with." (Citing cases) (R. 3773)**

Continuing, citing its decision in *Differential Rates*, 11 I.C.C. 13 (1905), the Commission noted that "traffic does not stop at the ports but moves to foreign destinations." (R. 3773). Citing also its decision in *Albany*

* *In the Matter of Differential Rates*, 11 I.C.C. 13, 65-66 (1905).

** Despite this finding, the I.C.C. in its Report on Reconsideration, abruptly announced as its conclusion of law, "Such great differences in distance, under the circumstances here revealed, may not be ignored without running counter to the provisions of Section 3(1) of the act." (R. 3854)

Port Dist. v. *A. & W. R. Co.*, 219 I.C.C. 151, 162 (1936), the Commission quoted (R. 3773):

> "The port rates * * * have, as their chief objective, the maintenance of a competitive relation between the ports. They are not distance rates."

This principle has been followed in every final decision of the Commission since it was founded, except in the case at bar.*

To put it another way, no final decision of the Commission or of any court has ever denied a railroad the right to equalize rates on rail-ocean traffic from interior competitive territory. For this there is good reason. The national interest, economics and justice have required equal through rates and the nation has grown and prospered under them. Such is the essential justice of the underlying policy of equal competitive opportunity that it has been adopted on an ever-widening scale even as to domestic traffic. It was applied on a broad national scale in *New York* v. *United States*, 331

* The *Iron Ore* cases (*infra*, p. 72) are not an exception to this rule. There the Commission has been reversed twice, has made two different, inconsistent decisions, and is now undertaking to review the question for the third time, ten years after the case was started. Equally inapropos is *City of Wilmington* v. *A. G. S. R. Co.*, Docket No. 33247 (Div. 2, 1962) which is pending on appeal to the full Commission. That decision concerned export-import rates between South Atlantic Ports and certain interior "hinterland" southern areas, relatively close and immediately contiguous to the involved ports. In "hinterland" cases, the Commission and the railroads have accorded greater weight to distance differences because such areas are generally less than 500 miles distant from port areas and are considered as being tributary to the nearby port. Such, of course, is not the case with central territories which are properly served by many ports and groups of ports.

U.S. 284 (1947) where this Court applied the principle of equality of opportunity to great regions of the nation.

3. Disregard of Distance in Practice

The grand design of equalization is illustrated in Appendix B. The shaded area represents the Affected Territory. This map demonstrates the magnitude of equalization of rail rates for export-import traffic. It reflects wide disregard of distance differences in port adjustments all over the country.

Ocean rates are now equalized for every section of our coast (R. 1813). *Hillsborough County Port Authority* v. *A. & W. Ry. Co.*, 313 I.C.C. 691 (1961), *aff'd per curiam sub nom., Alabama, T. & N. R. Co.* v. *United States*, 207 F. Supp. 638 (S.D. Ala. 1962); *City of Portland* v. *Pacific Westbound Conference*, 4. F.M.B. 664, 667, 671 (1955).

Taking the Pacific first, it will be observed that on Appendix F a line runs irregularly from the Canadian border between Montana and North Dakota south to the Mexican border at El Paso. From every point in the United States east of that line, goods may be shipped at identical rates to any major port on the Pacific Coast from San Diego to Vancouver. Disregard of distance, permitted or specifically authorized by the Commission, is particularly marked with respect to the export-import rates between points west of the Mississippi River and the Pacific Coast ports. The Commission has permitted equalized rates from Texas, New Mexico and North Dakota points to Seattle and

Los Angeles which resulted in disregard of mileage differences ranging from 50 to 153%* (R. 2058-59).

From central points in the United States the same equalization of rail rates in rail-ocean traffic exists to all Gulf ports and to all South Atlantic Ports** (See Appendix B).

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*The following table illustrates the disregard of distance in export-import rail rates to the West Coast.

Inland Point	Number of Miles		Mileage Disregard	
	To Seattle	To Los Angeles	Miles	%
Rinoon, N. M.	1972	779	1193	153
El Paso, Tex.	2007	813	1194	147
Albuquerque, N. M.	1912	883	1029	117
Odessa, Texas	2240	1101	1139	103
Laredo, Tex.	2649	1486	1163	78
San Angelo, Tex.	2228	1262	966	77
San Antonio, Tex.	2496	1423	1073	76
Abilene, Tex.	2171	1267	904	71
Lubbock, Tex.	2009	1205	804	67
Corpus Christi, Tex.	2625	1569	1056	67
Brownsville, Tex.	2761	1706	1055	62
Austin, Tex.	2418	1503	918	61
Amarillo, Tex.	1888	1192	696	58
Ft. Worth, Tex.	2257	1441	816	57
Dallas, Tex.	2257	1441	816	57
Waco, Tex.	2299	1466	833	57
Ft. Buford, N. D.	1121	1751	630	56
Williston, N. D.	1142	1772	630	55
Houston, Tex.	2483	1629	854	52
Galveston, Tex.	2483	1629	854	52
Wichita Falls, Tex.	2097	1393	704	51
Tyler, Tex.	2351	1565	786	50

** In two cases, one decided just before the decision in the case at bar and the other just afterward, the Commission extended equalization to interior areas outside the Affected Territory. *Coal From Clearfield Group to Philadelphia for Export*, 308 I.C.C. 225 (1959); *Nueces County Nav. Dist. v. A., T. & S. F. Ry. Co.*, 315 I.C.C. 155 (1961). The Commission permitted disregard of distance differences in excess of 28% in the former case and compelled disregard of distance differences exceeding 32% in the latter.

In its Original Report, the Commission agreed that the distance disadvantages of the carriers serving the Northern Tier Ports were far less than the distances disregarded in other coastal areas. The Commission said (R. 3772):

> "Such distance disadvantages as they have are much less than the substantial differences in distances to and from some other ports which have a parity or near parity of rates, including the Canadian ports, and the wide differences which obtain where the several south Atlantic and Gulf ports are equalized."

This was a masterpiece of understatement in the light of distance differences disregarded in setting West Coast rates.

Turning now to the Gulf Coast, the South Atlantic and the North Atlantic, Appendix A shows the comparable distances. For purposes of illustration of short-line rail mileages to the ports, the City of Chicago was selected as the largest industrial and marketing complex in the Affected Territory, with equalized rates to the Gulf Coast and the South Atlantic but not to the North Atlantic.

Obviously, neither distance nor cost has been the controlling factor in shaping these far-reaching policies.

Even since the Commission strangely denied equalization in the case at bar, progress toward complete equalization for all other coasts has continued. Tampa is more than half of the way down the Gulf Coast of Florida. The short-line rail distance from Chicago to Tampa is 1199 miles. It is 837 miles from Chicago to Mobile, Alabama (Appendix A).

Nevertheless, Tampa sought equalized rates over the objection of the railroads. It is 362 miles (or 42%) farther from Chicago to Tampa than to Mobile. The Commission disregarded all considerations of cost and distance and compelled the railroads to give equalized rates to Tampa. *Hillsborough County Port Authority* v. *A. & W. R. Co.*, 313 I.C.C. 695 (1961), *aff'd. per curiam sub nom., Alabama, T. & N. R. Co.* v. *United States*, 207 F. Supp. 638 (S.D. Ala. 1962).

The order by the Commission in that case produced still further disregard of respective distances. For example, Pittsburgh, Pa. is 1193 miles from Tampa and only 660 miles from the closest South Atlantic Port. Yet the Commission compelled the railroads to disregard the distance advantage of that port, amounting to 533 miles, and to equalize the Port of Tampa even though the distance to Tampa was 81% greater than to the South Atlantic Port closest to Pittsburgh (313 I.C.C., at 709).

Even Corpus Christi, by compulsion of the Commission, is now equalized with all the other Gulf ports (Appendix A).* From Chicago the distance to Corpus Christi is 1257 miles compared with 837 to Mobile. The short-line mileage to Corpus Christi thus exceeds that to Mobile by 50%.

If distance is to be disregarded even when greater by 40%, 50%, 81%—and even 153%—it is impossible to understand how 16% greater distance can be cause for denying railroads an equal opportunity to compete. New York is 16% farther than Baltimore from Chicago.

* *Nueces County Nav. Dist.* v. *A. & S. Ry. Co.*, 251 I.C.C. 115 (1942).

The same conclusion results from a study of average distances to the North Atlantic ports from representative points in the Affected Territory. The Commission found the average of the short-line distances from class rate base points in the Affected Territory to be as follows (R. 3840):

North Atlantic Coast	Average short-line miles from class-rate base points in the Affected Territory*
Boston	921
New York	804
Philadelphia	750
Baltimore	698

It is notable that from those average points in the Affected Territory, Baltimore is 698 miles and New York is 804, or 15% farther. When distance differences up to 50%, 81% and even 153% are comfortably disregarded, there is no rational basis for treating 15% as cause for discrimination.

Hampton Roads has a somewhat different Affected Territory than the other two Southern ports. From its average points the distance to Hampton Roads is 883 miles but only 853 miles to New York. Hampton Roads is therefore actually 30 miles farther away than New York. But it has parity rates with Baltimore (R. 3840). Again it is impossible to understand how distance can be used as an excuse for such damaging discrimination against New York; but if that be its pur-

* The Commission also found Portland to be farther away from Affected Territory than any other North Atlantic port and Albany to be almost exactly the same distance as Philadelphia (R. 3847, 3853). Portland import rates have parity with Baltimore as to traffic passing over Canadian routes, and otherwise parity with New York. The Albany rates are the same as those of Philadelphia.

pose, it has succeeded. Of all the grain passing through the North Atlantic Ports from the Affected Territory in 1955-1956, Hampton Roads handled 48%, and New York 4% (R. 3820).

It is difficult to resist the District Court's conclusion in this case that the decision of the Commission was capricious and arbitrary. Distance could not possibly have provided a rational basis for that decision.*

* The extreme nature of the discrimination in this case against the Northern Tier Railroads and Ports is demonstrated by the following table. It shows that the only consistent feature of ocean-rail rate regulation has been to ignore distance differences elsewhere but to discriminate against the railroads serving the four Northern Tier Ports (See Appendix A).

Port Terminal	Short-line miles from Chicago	Levels of export-import rates (¢ per cwt.) LOWER than New York[1]
Corpus Christi, Tex.	1257	3¢ to 23¢
Tampa, Fla.	1199	3¢ to 23¢
Jacksonville, Fla.	1055	3¢ to 23¢
Portland, Me.	1045	3¢ to 8¢[2]
Houston, Tex.	1035	3¢ to 23¢
Morehead City, N. C.	991	3¢ to 23¢
Savannah, Ga.	989	3¢ to 23¢
Charleston, S. C.	980	3¢ to 23¢
Boston, Mass.	973	—
Port District of Hampton Roads (including Norfolk, Va.)	914	3¢ to 8¢
New Orleans, La.	890	3¢ to 23¢
New York, N. Y.	890	—
Pensacola, Fla.	886	3¢ to 23¢
Mobile, Ala.	837	3¢ to 23¢
Philadelphia, Pa.	814	2¢ to 6¢
Albany, New York	789	2¢ to 6¢
Baltimore, Md.	767	3¢ to 8¢

[1] The ranges in the rate levels under New York reflect different classes or kinds of freight. In the case of the South Atlantic and Gulf ports, the levels are the same for the same class or kind of freight where the same foreign country is involved.

[2] On import traffic via Canadian routes to the Affected Territory, otherwise same as the New York level.

Another illustration of the arbitrary nature of the Commission's decision is its total disregard of the testimony by shippers and receivers. A long line of witnesses whose business it is to route freight between the Affected Territory and foreign ports took the witness stand in the present case. Those witnesses included representatives of p[illegible]ically all grain merchants in Chicago, which is the largest grain distributing center in the nation (R. 2303-2336). They testified unanimously that Appellee Northern Tier Railroads will continue to lose the subject export-import traffic because of the rate differentials favoring the Southern Tier Railroads.*

This testimony was entirely uncontradicted and not a single witness from the Affected Territory supported the position of Appellants.

It was also notable that the only agencies of the federal government which appeared gave testimony in support of the proposed equalizing rates. The position of Appellees was supported by the United States Department of Agriculture and the General Services Administration (R. 2277, 2287).

As the Commission itself found:

> "The respondents' proposal * * *, if made effective, would generally provide an equality of aggregate transportation charges, rail and ocean, between foreign countries and points in the affected territory for the whole range of north Atlantic ports" (R. 3745).
>
> * * * * *
>
> "The primary purpose of the proposed adjustment * * *, is to re-establish the equality of

* *E.g.*, R. 2299, 2306, 2329, 2333, 2338, 2342.

through ocean-rail charges which existed prior to the ocean-rate equalization in 1935." (R. 3804)

The proposed equalizing rates of Appellee Northern Tier Railroads cannot be said to create undue and unreasonable prejudice against the Southern Tier Ports. On the contrary, they are consistent with the historic principle of equalized rail-ocean rates which began in 1877 in the North Atlantic and extends to the South Atlantic, the Gulf Coast and the Pacific Coast. The inescapable conclusion is that the rates proposed by the Appellee Northern Tier Railroads create no undue or unreasonable prejudice or discrimination against the Southern Tier Ports. If there be such prejudice, it is against the Northern Tier Ports under the existing rates.

4. The Irrelevant and Extraneous Considerations On Which the Commission Based its Decision.

Recognizing that distance differences are widely disregarded in all other export-import rates, the Commission sought support for its decision here in reference to "numerous other factors" and "circumstances here revealed". (R. 3804, 3854). Those "factors" and "circumstances" had no relevance to the issue of railroad rates here involved. They reflected an effort by the Commission to apportion prosperity among ports by allocation of traffic. This the law does not permit.

The Commission recognized this in one of its early decisions involving the North Atlantic ports and the Affected Territory. In *'Chamber of Commerce of*

N. Y. v. N. Y. C. & H. R. R. Co., 24 I.C.C. 55, 75 (1912), it declared:

> "It is urged that Boston is as dependent as is Philadelphia or Baltimore upon the differential territory for its exports and imports, and the Boston interests join in the contention that the railroads should so adjust their rates as to insure movement of a certain or substantial part of the traffic through those ports. *Neither the carriers nor the Commission has any right to undertake to so apportion the traffic between rival ports or cities.*" (Emphasis supplied.)

In *United States* v. *Illinois C. R. Co.*, 263 U.S. 515, 524 (1924), this Court held that the advantage which comes to a shipper by virtue of the location of his plant does not constitute an unlawful preference under Section 3(1), as the law does "not attempt to equalize opportunities among localities." This principle had been recognized by this Court at least as far back as its decision in *I.C.C.* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911).

This principle was subsequently reaffirmed by this Court in a landmark decision upholding the right of a railroad to compete by equalizing rail-ocean rates. *Texas & P. R. Co.* v. *United States*, 289 U.S. 627, 636-638 (1933). In that case this Court held that a railroad was entitled to establish rail rates to a port with a distance disadvantage on a basis of equality with a distance-favored port in order to equalize total rail-ocean charges. This Court accordingly struck down an order of the Commission which had required a distance differential. In so doing this Court held that railroads

were entitled to adjust their rates to competitive conditions, but that neither carriers nor the Commission could set rates for the purpose of building up one market or locality to the detriment of another. In this connection this Court said (*Id.*, at 638):

> "The Act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare."

The above section of the opinion met the approval of the minority and has not been overruled or modified. This Court further held that since ports were not mentioned in Section 3(1) they were not entitled to complain of prejudice under its provisions. After the *Texas & Pacific* decision Congress amended Section 3(1) in 1935 and again in 1940. The 1935 Amendment did nothing but add the words "port, port district, gateway, transit point" to the list of those protected against undue prejudice. (49 Stat. 607) The 1940 Amendment added regions, districts and territories. (54 Stat. 902)

The briefs of Appellants devote many pages to an effort to establish that the 1935 Amendment changed the standards by which unlawful prejudice was to be determined. Actually all that amendment did was to give ports, port districts, gateways and transit points standing to complain under Section 3(1), the same as shippers and others. It did not enable one port to complain of railroad rates because another port was bigger or more prosperous, any more than one shipper could insist on a preferential rate because his business was less

prosperous than that of a competitor.* Senators Moore and Walsh, two of the sponsors of the Amendment, both assured the Senate that the only purpose of the Amendment was to give ports the same standing as those already within the protection of Section 3(1).** 79 Cong. Rec. 10476, 10608.

In *New York* v. *United States*, 331 U.S. 284, 300, 305 (1947) this Court had occasion to consider the effect of the similar 1940 Amendment which added the words "region, district, territory" to Section 3(1). It confirmed that Congress intended no change in the applicable standard for determining undue prejudice. This Court said:

> "In other words Congress did not introduce a new standard of discrimination by its amendment to § 3(1); it merely made clear its purpose that regions, districts, and territories should be the beneficiaries of the law against discrimination." (*Id.*, at 300).

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* Even before the *Texas & Pacific* case was decided the Commission had held that it could not set rates to enable one manufacturer to obtain markets of competing manufacturers. *Stoves, Ranges, Boilers, etc.*, 182 I.C.C. 59, 68 (1932).

** The Appellants place heavy reliance upon the Senate's rejection of an amendment proposed by Senator Long. Their reliance is misplaced. The Long amendment said nothing about distance. It read (79 Cong. Rec. 10608): "Where rates and charges of common carriers to ports are made as reductions to equalize rates to ports served by competing carriers it shall not be termed undue preference or discrimination." Thus the proposed amendment would have written into legislation that whenever rates were made as reductions to equalize rates to ports it should not constitute undue preference or discrimination regardless of the motive, the type of traffic or any other circumstances. The District Court did not hold that equalization must under all circumstances and at all times be held to be lawful under Section 3(1).

"And, as we have said, the 1940 amendment to § 3 * * * did not change the prevailing rules respecting unlawful discrimination; it merely enlarged the reach of § 3. Hence we must determine from the pre-existing law whether a discrimination against a territory is obnoxious to § 3." (*Id.*, at 305).

The rationale of the 1935 Amendment was obviously the same.

This Court in the same case (331 U.S. at 315, 331) recognized that under the rule of the *Diffenbaugh* case the Commission is barred from attempts to equalize economic advantages, but concluded that on the facts of the case the Commission had not violated that rule.

The absence of power on the part of the Commission to allocate traffic and to act as an economic czar was forcibly restated in a recent decision of the District Court for the Southern District of New York involving equalization of iron ore rates to Affected Territory. The Court said:

"* * * [T]he Commission makes the point that rate parity will help New York and hurt Baltimore. * * * The Act does not vest the Commission with power to proscribe a reduced rate otherwise lawful under §§ 3 and 1(5) simply to prevent diversion resulting from competition; there was no finding that the New York rates constituted an 'unfair or destructive competitive practice.' We do not read the Act as giving the Commission so general an umpiring role over the fate of cities * * *." *New York C. R. Co.* v. *United States*, 207 F. Supp. 488, 494 (1962).

The role of "umpire over the fate of cities" is precisely the role the Commission assumed in the present case. It brushed aside the competitive needs of the

Northern Tier Railroads, and even those of the ports in their railroad rate aspects. It repeatedly emphasized the natural and commercial advantages of New York as a port and the large volume of traffic which passes through it.

The Appellants here seek to justify the Commission's decision on the same basis. Running like a refrain through their briefs are references to New York as "The Greatest Port in the World". Of course New York is a great port. San Francisco is a great port. So too are Galveston, New Orleans, Mobile, Baltimore, Hampton Roads, Philadelphia and Boston. Some are larger. Some are smaller. But all are entitled to be free of unjust discrimination.

Nature endowed the Port District of New York with unique advantages. It has 650 miles of navigable waterfront, including 200 piers capable of berthing 400 ships at one time. The total population of the area of the Port District of New York is about 13,000,000. More than 430,000 people depend on Port jobs for their livelihood (R. 1808), earning more than $2 billion annually (R. 1803, 1805, 1820). The Port District of New York is not just one port or one city. It is not just Manhattan, Brooklyn, Queens, the Bronx or Staten Island. It consists of many deep-water ports in two states, each with its own waterfront* (R. 1803-1804).

The facilities of the Port of New York are vital to national defense (R. 2255, 2263). During World War II it was the Port of Embarkation from which sailed

* These include:

Newark, New Jersey	Irvington, New York
Jersey City, New Jersey	Bayonne, New Jersey
Hoboken, New Jersey	Edgewater, New Jersey
Elizabeth, New Jersey	Yonkers, New York
Weehawken, New Jersey	Perth Amboy, New Jersey

half of our armies overseas and a third of all their supplies (R. 1809). It would be a tragedy indeed if the Port District of New York should be allowed to decline further and the Nation should lose the priceless services it provides both in time of peace and in time of war.

It seems curiously inappropriate to suggest that because the port is large or because its name is New York, it should be denied the same equal treatment which has been conferred upon all other major ports in America outside the Northern Tier. It would be equally inappropriate to suggest that the railroads which serve it should be denied an equal opportunity to compete for traffic.

A further indication of reliance on the non-existent power to allocate prosperity among ports is found in the many pages of Appellants' briefs, and of the Commission's Reports in this case, devoted to showing how much traffic passes through the Port District of New York. Naturally it takes a tremendous flow of traffic to support a port of this enormous size. But that has nothing to do with the question whether the railroads which serve it are to be allowed to survive as competing carriers. Nor is it relevant to the question whether the proposed rate reductions would cause prejudice to any of the Appellants. Equalizing rates applying only to rail traffic to and from Affected Territory could not prejudice Appellants merely because other kinds of traffic are flowing through the Port of New York.

Over 90% of the traffic flowing through the Port of New York does not move by rail to and from the Affected Territory (R. 3818, 3820). Most of it does not move by rail at all. At least half of it goes by truck (R. 3760).

Appellee Railroads are before this Court because they desperately need an opportunity to compete for an improved portion of the export-import traffic which is carried by rail and does move to and from the Affected Territory through the North Atlantic Ports—the only traffic with which this case is concerned. The hard fact is that Appellee Railroads carry only 24% and the Appellants 76% of that traffic. (R. 3820).

In the Commission's own words, the traffic study reflected in Appendices E and F to the Commission's Original Report (R. 3819, 3820) is the "best evidence which the record affords of the combined relative impact of the present differentials and other circumstances upon the movement of the subject traffic through the several ports." (R. 3765) Appendix F shows the total figures on traffic to and from the Affected Territory for a 12 month period in 1955-1956, immediately preceding the publication by Appellee Railroads of the proposed equalizing rates. The amount of the total rail-ocean traffic between the Affected Territory and North Atlantic ports during that period was as follows:

	Net Tons*	Percentage of Total
Moved by Appellee Northern Tier Railroads (Respondents Before the Commission)	2,636,101	24%
Moved by Appellant Southern Tier Railroads (Protestants before the Commission)	8,333,656	76%
Total	10,969,757	100%

* These are the combined totals of export and import rail tonnage taken from Appendix F and allocated to the respective railroads as stated therein. (R. 3820)

There could be no more dramatic proof that the Commission could not have based its decision on the competitive needs of Appellee Railroads.

Appellants insist however that the total volume of traffic handled by the respective ports is an important basic consideration, regardless of the commodities involved, their origin or destination or even whether they move by rail. Since they so argue, the total figures, not mere fractions of them, should be examined.

The record shows the total export-import tonnage moving through all the North Atlantic Ports in 1933 (shortly before equalization of ocean rates was completed in 1935). Of all the traffic through the North Atlantic Ports, in 1933, the four Northern Tier Ports handled 65.3% compared with 34.7% for the Southern Tier Ports (R. 1703, 1705).

By 1955, the situation had dramatically reversed. The Southern Tier Ports handled 63.5% and the Northern Tier Ports 36.5%.

Taking the total traffic of the Port of New York alone provides an illuminating contrast with the total of all traffic flowing through the three Southern Tier Ports. The same record data show that in 1933, of the total traffic flowing through these four ports, New York handled 61.4% as compared with 38.6% for the Southern Tier Ports. Again the reversal was dramatic. By 1955 the total tonnage through the three Southern Tier Ports was more than 2.5 times that of New York, *i.e.* 71.7% as against 28.3% (R. 1703).

Of the total relevant rail traffic between Affected Territory and the seven North Atlantic Ports in the test year 1955-1956, we find that all four of the Northern

Tier Ports together handled only 33% and the Southern Tier Ports 67% (R. 3219). With two-thirds of the relevant traffic, the three Southern Tier Ports are scarcely in a position to claim prejudice or discrimination of any kind. It is notable that these computations do not include import iron ore or export coal because they are not involved in this case. Since Appellants choose to rely on total volume of traffic as a relevant fact it should be observed that were coal and iron ore included it would be found that the proportion of the traffic handled by the Northern Tier Ports would be further radically reduced (R. 3750).

The traffic figures called by the Commission the "best evidence" cannot be obscured by synthetic compilations of selected types of traffic moving through selected ports. Fragmentation of statistics is never profitable, whoever may appear to be the beneficiary. It is the height of sophistry to make an argument based on the total amount of traffic moving through a port, without regard to the means of transportation, and then, when dealing with the rail traffic actually involved, to eliminate the very portions most vital to the competitive needs of Appellee Railroads. Yet this is exactly the basis on which the Appellants appeal to this Court.

Specifically, both the Commission and Appellants employ statistics excluding altogether the products on which the Southern Tier Ports have a near monopoly: import ores (other than iron ores not affected by the proposed rates) of which they handle 98.1%, and export grain of which they handle 83.4% (R. 3820).

The Commission found that a balance between general cargo and bulk cargo is "essential to a healthy port

economy." (R. 3754) By this definition, New York is the unhealthiest port in America. The railroads which serve it also vitally need equalized rates for their own survival. Without such rates they have no chance of competing for bulk traffic.

The heavy emphasis on general cargo moving through New York is another illustration of resort to such statistics by Appellants. They, as well as the Commission, stress the fact that much general cargo flows through New York, but persistently neglect to point out that even if relevant, these data would provide the very statistics as to the decline of the Port of New York which they say do not exist. Between 1923 and 1956 the Nation's exports of general cargo increased from 21.7 million tons to 27 million tons. In that same period, New York's share declined from 7.9 million tons to 6.4 million tons. Even more striking is the fact that in percentage terms New York's share of the Nation's exports of general cargo declined from 36.3% to 23.7%. (R. 3818).

The Nation's imports of general cargo increased in the same 33-year period from 17.8 million tons to 22.8 million tons. During the same period New York's share declined in absolute terms from 8 million tons to 6.5 million tons and in percentage terms from 45% to 28.5% (R. 3818). As these figures dramatically indicate, general cargo is a diminishing asset to the railroads serving the Northern Tier Ports (R. 3818). As Commissioner Webb said in his compelling dissent:

> "These conclusions appear to restrict New York and the other northern tier ports to a shrinking class of traffic * * *" (R. 3811).

Various other irrelevant circumstances were relied on by the Commission and other Appellants concerning services and facilities in the respective ports. New York is, to be sure, a city of superior services and facilities. New York citizens and its public authorities have built 200 piers and many other facilities at tremendous cost. New York does indeed have many banks, freight forwarders, ship brokers, consular services and foreign chambers of commerce which facilitate speed of movement of cargo. All these are mentioned as if they were evils to be remedied.

As the Commission found, Southern Tier Ports have their own special facilities too. They include large modern facilities which, coupled with the favorable rail differentials, have given Appellant Railroads a virtual monopoly in the transportation of the heavy volume bulk ores and grain so necessary to mass movement and reduction of unit costs (R. 3768-69). In these facilities, unlike those of New York, the Commission sees no evil. Nor should it—in either case.

The development by each port of its own special facilities and services is the essence of competition. It is the very competition which the great principle of equalization of rail-ocean rates is designed to foster. It is the antithesis of the result that would be produced by distance rates which naturally tend to funnel the traffic through the most distance-favored port.

By some process of inverted reasoning, however, it is suggested that the railroads serving Northern Tier Ports should not be allowed to compete by establishing equal rail rates. In any event, the Commission says,

equal rates would not benefit Portland, Boston or Albany because they do not offer the attraction of special facilities, and such rates would be too helpful to New York which does (R. 3785, 3806). At the same time the Commission argues that because the Southern Tier Ports have the best bulk cargo facilities of all, the Northern Tier Railroads should not be allowed to compete for the grain and ore traffic (R. 3768-69). So, New York's special facilities on this curious reasoning are to be counted against it. Yet the special facilities located at the Southern Tier Ports are to be counted in their favor.

It is scarcely comforting to railroads in desperate financial condition to be told that they are serving three ports which cannot possibly benefit from fair treatment and another port which would benefit too much. It is thin gruel to Appellee Railroads to be told that they are serving a flourishing Port of New York while they starve for lack of business.*

If there was ever a case where the Commission ignored its own findings and based a decision as to railroad rates on an effort to perform an "umpiring role over the fate of cities"; this is the case.

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*Of the various Northern Tier Railroads which originally participated in proposing the equalizing rates, two have avoided bankruptcy only by merging, one has actually gone into bankruptcy and the others are in serious financial difficulty. *Erie R. Co. Merger*, 312 I.C.C. 185 (1960); *In the matter of the New York, N. H. & H. R. Co., debtor*, U.S.D.C. D. Conn., July 26, 1961. See, *e.g.*, *New York C. R. Co. Loan Gharanty*, 307 I.C.C. 365 (1959); Mass. Gen. Laws ch. 464 (1961).

C. There was No Issue Before the District Court and there is None Here, as to Retaliatory Rate Proposals by Appellant Railroads.

As previously noted, after Appellee Railroads published their equalizing rate reductions, Appellant Railroads as a retaliatory step published new rates at a lower level in an effort to restore the differentials in their favor.

The Commission determined the issue under Section 3(1), as to the equalizing rates proposed by Appellee Railroads, independently of the retaliatory counter-proposal (R. 3753). As to the counter-proposal, it found that the retaliatory rates proposed by Appellant Railroads were "not shown to be just and reasonable" and ordered them cancelled (R. 3807).*

They took no cross-appeal and entered no prayer for reversal of the action of the Commission in cancelling their proposed retaliatory rates, confining themselves to an argumentative defense that those proposed rates were a reason for dismissing the complaint. Their only prayer was for a dismissal of the action. Accordingly the District Court was presented with no issue as to the validity of the Commission's order cancelling the retaliatory rates and there is none before this Court (R. 3909-3992).

Nevertheless, Appellants belatedly seek to raise in this Court questions relating to their retaliatory rate

* The citation of this finding as relating to the rates proposed by Appellees in the Brief for the Commission (pp. 67-68, citing R. 3807) is obviously an inadvertence, as is made clear elsewhere in the same brief (p. 5 and fn. p. 68). No such finding was made at page 3807 of the Record or elsewhere.

proposals. They make the curious argument that because they threatened a retaliatory rate war, the rate reductions earlier proposed by Appellee Railroads became unlawful under Section 3(1). Arguing that Appellant Railroads have been deprived of "competitive freedom to put into effect reduced rates", the Brief for the Commission (pp. 65-66) again resorts to the shibboleth of "enforced equalization". There is nothing in the decision of the District Court depriving Appellant Railroads of freedom to propose reductions of their own rates or preventing the filing of a complaint under Section 3(1) against the rates being charged by Appellee Railroads. Either step can be taken at any time.* Moreover, the Commission itself can at any time institute a proceeding under Section 15(1) to determine whether it should undertake to prescribe rates to be charged by Appellees, Appellants or both.

If Appellant Railroads wish to reduce their own rates under a claim of "undue diversion" of traffic, orderly procedure will make possible a determination

* The outcome would have to depend upon proof in an appropriate proceeding and cannot be hypothesized in advance on the basis of briefs of counsel. In such a proceeding, for example, the showing of need by Appellants to compete might be quite different from that shown by Appellees here. The Commission's own findings here showed that Appellee Railroads had a particularly pressing need to compete for the bulk cargo traffic so important to mass volume and reduction of unit costs. One of the findings was that the Southern Tier Railroads during the test year 1955-1956 carried to and from Affected Territory all but 1.8% of the total volume of import bulk ores and all but 15.4% of the export grain. Thus, Appellee Railroads were asserting the right to compete against a monopoly; but Appellant Railroads (absent some change of circumstances since 1956, the time as of which the present record speaks) would be asserting the right to preserve a monopoly maintained by preferential rates (R. 3812, 3820).

in the light of actual performance under equalized rates.

One point on which there appears to be unanimity is that the most satisfactory test of rates is the result of their operation. The Commission majority said so (R. 3752). The dissent of Commissioner Webb said so (R. 3811). Appellant Railroads say so (Brief, p. 21). We agree.

The decisions upholding equalization of export rates on ex-lake grain vividly illustrate the difference between prejudice and harm when seen in a crystal ball and when sought to be proved on a record.

In 1949, in a case remarkably similar to the present case, the Northern Tier Railroads published proposed rate reductions to equalize their rates with those of the Southern Tier Roads, thereby restoring equality of total rail-ocean charges on export grain shipped from Buffalo after arrival by way of the Great Lakes.* As they do here, the Southern Tier Railroads and Ports opposed the equalizing reductions and made dire predictions of the calamity that would befall them if competition on a basis of equality were permitted. They forecast that under equalized rates all the export grain traffic would be siphoned off from Baltimore and Philadelphia. The Commission apparently accepted these gloomy predictions and ordered the equalizing rates cancelled as not shown to be just and reasonable. *Export Grain From Buffalo To New York*, 278 I.C.C. 31 (1950).

* Since this grain does not move by rail from Affected Territory, it is not involved in the present case.

On review a three-judge District Court unanimously reversed the Commission. *New York C. R. Co. v. United States*, 99 F. Supp. 394 (D. Mass. 1951). This Court affirmed. *I.C.C. v. New York C. R. Co.*, 342 U.S. 890 (1951). The District Court in the *Ex-Lake Grain* case noted that the Commission had intimated, without expressly finding, that the equalized rates would result in unlawful prejudice to the Southern Tier Ports in violation of Section 3(1) (99 F. Supp. at 402, 404). The court said, however, that undue preference or prejudice was not a matter to be determined by speculating on the future. It regarded threats by the Baltimore & Ohio of a retaliatory rate war as "insufficient justification for the Commission's refusal to allow a carrier to alter the rate relationship since the Commission has adequate power to deal with such a situation should it arise." (*Id.* at 405) The court also concluded (at 404):

> "Evidence that at some time in the future under changed conditions New York might have too great a competitive advantage if the rates are equal is not a sufficient basis for finding that such equalization must now be denied on the ground of undue preference or undue prejudice. * * * Should future changes in conditions cause the rate equalization to result in undue prejudice, the Commission can correct the situation at that time."

It is the last act of the ex-lake grain drama that relates most importantly to the present discussion. After the equalizing rates on export grain became effective, the Southern Tier Roads did in fact publish retaliatory rates seeking to restore the differentials in

their favor. After full hearings, the Commission was compelled to find that the earlier predictions of calamity had not eventuated. *Export Grain From Buffalo To New York*, 292 I.C.C. 647 (1954). When the matter was examined on the basis of proof instead of prophecy, there was a drastic difference. In the light of actual performance under the equalized rates, the Commission found "abundant evidence of the dominant position which Baltimore and Philadelphia have attained with respect to this traffic, as contrasted with that at the time of the hearing in the proceeding last above mentioned." (*Id.* at 659).

The bugaboo of threats of danger of a rate war is at best illusory and at worst a form of procedural blackmail. Appellants argue as if the possibility of a rate war stemmed from the equalizing reductions of Appellee Railroads rather than from the threat of retaliation by Appellants. Quite the reverse is true. Equalization has been the means by which rate wars historically have been prevented and stability of rate structure achieved. As the Cooley Report so convincingly demonstrated, that was the great practical achievement of the original North Atlantic equalization agreement of 1877.

This Court has itself pointed out the absurdity of the argument that existing rates must be maintained, even if unsound, for fear of a rate war. *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935). The Commission there had ordered proposed rate reductions cancelled, partly on the ground that a rate war might be precipitated. A three-judge District

Court set aside the order. This Court affirmed the District Court, saying (*Id.* at 509):

> "The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds."

The Court went on to point out that the Commission has two ways of keeping changes within bounds—by exercising its supervisory power to keep rates proposed by carriers within "the rule of reason" and by initiating a proceeding of its own under Section 15(1) and prescribing a rate structure.*

Finally, the phantom of a possible rate war does not have the slightest relevance to the issue held by both the Commission and the District Court to be the real issue in this case—whether the rate reductions of Appellees caused unlawful prejudice to Appellants. The reductions proposed by Appellees were either lawful or unlawful under Section 3(1) when published. There could be no rational basis for holding that an act lawful when done was rendered unlawful by subsequent retaliatory conduct of another.

There is no question of any kind for determination on this appeal as to any rates of Appellant Railroads, actual or prospective. The appeals are from a decision which dealt with the one question presented to the Dis-

* There can be no quarrel with the statement in the Commission's brief (p. 62) that the Commission may use its power to prescribe minimum rates as a means of preventing rate wars as was done in *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949). The *Ayrshire* case is pertinent here, however, only as an enlightening contrast. There the Commission had prescribed the rate structure. Here it has not.

trict Court—the lawfulness of the equalizing rates proposed by Appellee Railroads.

II.

The District Court properly set aside and enjoined the order of the Commission since remand was neither requested nor necessary nor useful.

Alone of all the Appellants, the Commission contends that the District Court should have remanded the case to it for a third review. It is supported on this point and on no other by the United States. The suggested purpose is for the Commission again to reconsider whether the rates proposed by Appellee Railroads were just and reasonable under Section 1(5) of the Act. The United States alone urges also a remand for further consideration of the issue under Section 3(1).

A remand for a third round of proceedings before the Commission would serve no purpose other than delay and prolongation of the windfall Appellant Railroads have enjoyed through seven years of litigation. It is not surprising that none of the Appellant Railroads and none of the Appellant Ports have had the temerity to suggest it.

A. The District Court Properly Set Aside the Commission's Order Without Remand for Further Consideration Under Section 1(5).

As shown in Point I, both the Commission and the District Court found the real issue involved in this case to be one of rate relationships. They could not have

so found had there been a *bona fide* doubt whether the rates proposed by Appellee Railroads were just and reasonable within the meaning of Section 1(5) of the Act. There was none. The decision of the Commission was based solely on an erroneous conclusion of illegality under Section 3(1) of the Act, and the District Court properly vacated and enjoined the order of the Commission without remanding the matter for further proceedings.

In the original hearing before the Examiner, Appellants took the position that the rates proposed by Appellee Railroads were not compensatory and therefore not "just and reasonable" within the meaning of Section 1(5). The hearings before the Examiner were spread over a period of seven months, and much evidence and argument was presented on the question whether the rates proposed by Appellee Railroads were just and reasonable. (See, *e.g.*, R. 122, 1684-88, 3279-82).

The Examiner recommended to the Commission that it make certain findings, including the following (R. 3729):

> "The Commission should find: (1) That respondents [Appellee Railroads] have not shown that their proposed rates would be just and reasonable * * *.
>
> "The Commission should further find that protestant railroads' [Appellant Railroads'] proposed rates are not shown to be just and reasonable."

Appellee Railroads filed an exception to the first of the above recommendations, relating to their rates.

and the exception was the subject of briefs and oral argument before the Commission (R. 1607).

When the Commission issued its Original Report, fourteen months after the Examiner's report, it was logical that the Commission should first dispose of the just and reasonable aspects of the rates proposed by Appellee Railroads before taking up the issue of rate relationship. It did so. The Commission found no basis for declaring that the proposed rates of Appellee Railroads had not been shown to be just and reasonable. It rejected the adverse finding recommended by the Examiner. (R. 3807; Certified Transcript of Oral Argument before the District Court, p. 73 (Oct. 16, 1961)).

The Commission did, however, make the recommended finding that the retaliatory rates proposed by Appellant Southern Tier Railroads had not been shown to be just and reasonable (R. 3807).

Appellee Railroads demonstrated the reasonableness of the proposed rates by proof which is standard in cases of this character. This proof satisfied both the Commission and the District Court that the reductions proposed were minimal in nature (R. 3792, 4000). The Commission found that the ton-mile revenues of Appellee Railroads on export-import traffic between Chicago and New York would be reduced by only 9/10ths of a mill on first class traffic and by only 1 and 2/10ths mills on class 13 traffic (R. 3792).

In addition to demonstrating the minimal nature of the revenue reductions, Appellee Railroads sub-

mitted evidence comparing the anticipated revenues from the proposed export-import rates with revenues from other types of traffic and revenues of other railroads. It showed that average ton-mile revenues would be 2.47¢ on import traffic from New York to Affected Territory and 2.32¢ on export traffic from Affected Territory to New York as compared with average ton-mile revenues of 1.384¢ for all Class I railroads in the United States (R. 3280, 3282, 4001). Thus, the reduced export-import rates proposed by Appellee Railroads would produce revenues almost double the average for all Class I railroads.

In another comparison the Commission found that the proposed reduced rates between New York and the Affected Territory would produce average revenues of $19.20 per ton on import traffic and $18 per ton on export traffic, as compared with $8.12 and $9.38 respectively under the present rates between Baltimore and Affected Territory (R. 3792). Of course the New York traffic includes the higher-rated, more costly general cargo. Nevertheless the comparison shows a ratio of two to one—in this instance the comparison being between Appellee and Appellant Railroads.

Most significantly, the uncontradicted evidence also showed that the average revenues of Appellee New York Central Railroad under the proposed reduced rates would be about double the average revenues produced by all its other freight operations (R. 122, 101).

The Appellees made a *prima facie* showing that their proposed reduced rates were just and reasonable and the District Court so found (R. 4001).

In other cases the Commission has repeatedly ruled that evidence similar to that reviewed above is sufficient not only to make out a *prima facie* case but to show that such rates are in fact compensatory. Notable examples are *Powdered or Flaked Milk From Vermont To Boston*, 246 I.C.C. 522, 524 (1945); *Tea From Chicago, Ill. To St. Louis, Mo.*, 304 I.C.C. 470, 471-472 (1958); and *Soda Ash From Delaware etc., To Bessemer City, N. C.*, 308 I.C.C. 720, 721-722 (1959).

In the *Flaked Milk* case the Commission found the reduced rates proposed by the railroads to be compensatory on the basis of comparisons of the revenues anticipated from the proposed rates on flaked milk with the average revenues from all freight traffic of the same railroad. The comparison showed that on the basis of car-mile revenue the proposed rates would yield about 38% above the average and on the basis of ton-mile revenue about 65% above the average. The Commission referred to no cost evidence.

The *Tea From Chicago* case involved another single commodity rate. Again, the Commission referred to no cost evidence but only to a comparison of car-mile revenue under the proposed reduced rate on tea with the average car-mile revenue from all freight traffic of all Class I railroads in the Central Western Region. The comparison showed that the revenue under the proposed rate would be approximately double that average. The Commission specifically rejected the contention that the railroads had not shown the proposed rate to be compensatory, saying (304 I.C.C. at 471-472):

> "The protestant contends that the respondents have failed to meet their burden of proof with

respect to the compensatory nature of the proposed rate, and have failed to furnish any satisfactory rate comparisons. It states that the average revenue experience of all carriers in a region is of little value in determining whether rates on particular commodities are just and reasonable. While the average revenue on all carload traffic in a region or territory may not ordinarily be accepted as determinative of the reasonableness of any specific rate, nevertheless when the revenue yield under a proposed rate, as here, is more than double the average revenue on all carload traffic, it is logical to conclude, in the absence of other evidence to the contrary, that the rate is compensatory."

In the *Soda Ash* case, only a year before the Original Report of the Commission in the present case, the Commission found the rates compensatory on the basis of a comparison of the revenue under the proposed rates with the average freight revenue of all Class I railroads in the Eastern District. The comparison showed that the revenue from the proposed rates would exceed by 44% the average freight revenue of all Class I railroads operating in that District on either a car-mile or ton-mile basis. Again there was no reference to cost evidence.

These three cases are particularly apposite authority here. The ton-mile revenues from the proposed rates in the present case were shown to exceed the revenues with which they were compared by an equal or greater percentage than in the cases cited. Moreover, the comparisons in the present case involve the average of a wide variety of commodities, not just a single commodity. Thus, the Commission and the Dis-

trict Court here had before them a much more reliable indicator than in the cases cited.

If there had been any real need in the cited cases to add proof in the form of cost studies to the proof afforded by revenue comparisons, it would have been a relatively simple matter to present a cost study on a single commodity. In the present case, however, meaningful cost studies on literally thousands of commodities, moving to and from numerous points throughout the Affected Territory, would have been practically impossible to compile. To have required them would have been grossly unreasonable. Even if at all possible, such studies would have involved time and expense out of all proportion to their probative value. During the proceedings before the Commission the Southern Tier Railroads made a formal request for an investigation by the Commission of such costs. The Commission denied the petition, saying in part:

> "to grant the petition would entail a costly and time consuming delay * * * the circumstances and the matters submitted in the petition do not warrant institution by the Commission of the requested investigation." (R. 59)

That such cost evidence is not required in order to establish that rates are just and reasonable has been recognized by this Court as well as by the Commission. *Louisiana Pub. Serv. Commission* v. *Texas & N. O. R. Co.*, 284 U.S. 125 (1931). *Alabama Great Southern R. Co.* v. *United States*, 340 U.S. 216, 223, 225 (1951).

In the *Louisiana Public Service Commission* case railroad rates for ferry service across the Mississippi River were challenged for lack of evidence to show the

cost of the service. No rate specifically applied to carriage across the river, but to cover the ferry service eight cents per ton had been added to the mileage scale applied generally in the states through which the traffic moved to the river. This Court upheld the rate, saying (*Id.*, at 132):

> "While in the making of reasonable rates all material facts are to be regarded, it has never been deemed necessary or practicable—if indeed it is at all possible—to ascertain in advance the cost to carriers of each of the various elements embraced in the transportation service. The Act does not require any such determination."

In the *Alabama Great Southern* case the Commission had ordered certain railroads and interstate barge lines to establish joint through rail-barge rates differentially lower than the all-rail rates. There was no proof as to the relative cost of all-rail and rail-barge service, and the Commission had concluded that it was unable to find that there were demonstrable economies in rail-barge transportation which from the standpoint of cost of service would justify differentials. The railroads affected by the order attacked its validity on the ground that the Commission could not prescribe rail-barge differentials without such cost evidence. This court upheld the order saying in part (340 U.S. at 223, 225):

> "Neither the Commission nor this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate, or differential. * * * (Footnote omitted.) * * * There is no provision in the statute making relative costs of rail and water carriers

> the sole and controlling consideration in establishing joint rates. Indeed, the statute makes no mention of such costs at all. We do not say that relative costs when properly supported by evidence are not a matter to be considered, but we cannot say that the absence of that factor is fatal."

As shown above, Appellees made out a *prima facie* case by standard methods which have been accepted for over half a century. In response, Appellants introduced cost evidence with respect to part of the traffic in an effort to show that the proposed rates would not be compensatory. That evidence was challenged by Appellee Railroads. After adjusting and restating these costs, the Commission said that the cost evidence was not complete because it did not embrace all types of traffic and the specific methods of handling each type* (R. 3797). However, as to the type of traffic it did embrace, Appellants' rebuttal failed to convince the Commission that the proposed rates would not be compensatory. The Commission found (R. 3797):

> "* * * application of the resulting costs to the New York traffic indicates that the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs."

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* As mentioned above the Commission had earlier recognized that the time and expense of such a study was neither necessary nor warranted (R. 59). It would have involved thousands of commodities moving to and from numerous different points in the Affected Territory and would have been an impossible task. Moreover, a *prima facie* case of reasonableness was made out by other standard methods of proof. The Commission's reference to such a cost study related particularly to "traffic which those rates are expected to attract." This of course would consist mostly of direct-loading bulk cargo. Such cargo involves substantially lower transportation costs than other cargo and would lower unit costs rather than raise them (R. 3385, 1388). Increased volume of traffic as a result of the proposed rate reductions would reduce unit costs and thereby increase total net revenues (R. 54-56).

Time after time the Commission has ruled that a rate is compensatory if it covers variable or "out-of-pocket" costs and makes some contribution to constant costs. In a decision rendered in a complaint case only six weeks ago, the Commission referred to this elementary rule and added that so long as out-of-pocket costs are covered, a rate need not exceed such costs by more than a very small margin if any at all. *Baltimore & O. R.* v. *Chicago & E. Ill. R.*, I.C.C. Docket No. 33706, decided January 28, 1963. In that case out-of-pocket cost per ton on 75% of the traffic involved was $2.13 and on 25% of the traffic $2.17, the composite average being $2.14. The Commission prescribed a rate of $2.17 as a reasonably compensatory rate. It pointed out that, despite references in some of its decisions to "a contribution" over and above out-of-pocket costs, the general rule is that "out-of-pocket costs establish the rate floor." The Commission added:

> "More often than not the Commission finds, in the light of the facts developed in a particular case, that a minimum reasonable rate is one that contributes something more than the carrier's bare out-of-pocket costs. *E.g., Animal or Poultry Feed, Hebron, N. Dak., to Twin Cities*, 314 I.C.C. 181, 184. However, the Commission is not precluded from finding that a minimum reasonable rate is one which merely covers out-of-pocket costs and, in fact, has found in exceptional circumstances (not here present) that *a minimum reasonable rate may be less than the out-of-pocket cost* determined in accordance with Rail Form A. *Cf.* I. & S. Docket No. 7179, *Coal—Southern Mines to Tampa and Sutton, Fla.*, ___ I.C.C. ___, decided October 1, 1962." (Emphasis supplied).

The finding of the Commission in the present case, shows on its face that Appellee Railroads met the compensatory test. Indeed, the showing was stronger, and the finding more significant, than appears on the surface. The Commission included in out-of-pocket costs a return of 4% on investment after Federal income taxes (or approximately 8% before taxes) (R. 3793). Such a return would not only be compensatory; it would be a bonanza to all the Appellee Railroads. None of the Appellee Railroads realizes an average rate of return of anything like 4%.*

In his able dissenting opinion, Commissioner Webb expressed his agreement with the Commission's statement about out-of-pocket costs (*supra*, p. 61), pointing out that "the proposed rates which are found to 'equal or exceed by a small margin' the estimated out-of-pocket costs (which include a 4 percent return on investment after Federal income taxes) would not burden domestic traffic" and in fact "would make a far greater contribution to the total transportation burden than the rates applicable to other traffic." (R. 3813)

Thus, the record that came to the District Court showed minimal rate reductions, uniformly favorable revenue comparisons, the above-quoted finding of the Commission regarding out-of-pocket costs, rejection by the Commission of the recommendation of its Examiner adverse to Appellees on the issue of reasonableness, a finding by the Commission that the sole issue

* The Record contains the figures for 1958, showing a rate of return of only .61% for the New York Central and none at all for the New Haven. For 1957 the Lehigh Valley had a rate of return of .44% and the New Haven .08% (R. 3813).

was one of rate relationships under Section 3(1) and its representation to the same effect to the District Court. What the record showed was further reinforced on oral argument in the following colloquy between Judge Woodbury and Mr. Hay, representing the Commission:

> "Judge Woodbury. Well, now, did the Trial Examiner make any finding as to the rates being fair and reasonable?
>
> "Mr. Hay. He made a finding that they were not just and reasonable. *That finding was eliminated by the Commission.*" (Emphasis supplied) (Certified Transcript p. 73 (Oct. 16, 1961)).

The Commission's request for remand is not only groundless but is not timely. At no time in the District Court, in briefs or oral argument or otherwise, did any Appellant or the United States remotely suggest remand by the District Court to the Commission. After the District Court made its decision, the Commission joined the other Appellants in a motion in the District Court for a stay pending appeal to this Court; but even then no one even suggested any remand or any reason why the Commission should review the matter further. It was not until the Commission filed its Jurisdictional Statement in this Court that it sought for the first time to raise the remand point (J.S., 14-15). No party to this case except the United States and the Commission itself has sought to raise the question even in this Court.

The judgment of the District Court in the present case was precisely the type of judgment affirmed by this Court in the *Ex-Lake Grain* case. In that case the

Commission had ordered cancellation of equalizing export rates proposed by the Northern Tier Railroads on ex-lake grain from Buffalo solely on the basis of a finding that such rates were not shown to be just and reasonable. *Export Grain From Buffalo, N. Y.*, 278 I.C.C. 31 (1950). A three-judge District Court reversed on the ground that the decision of the Commission lacked the support of adequate findings and substantial evidence. The court held that the proposed rates had been shown *prima facie* to be just and reasonable. It further held that if statements in the Commission's report were to be treated as a finding that the rates would unduly prejudice the ports of Baltimore and Philadelphia, the finding was not supported by the record. Accordingly, the court set aside the order of the Commission. *New York Central R. Co.* v. *United States*, 99 F. Supp. 394 (D. Mass. 1951).

This Court affirmed *per curiam*, rejecting the precise contention made by Appellants in the present case —that the court below had erred by improperly assuming the primary jurisdiction and the administrative functions of the Commission.* *I.C.C.* v. *New York Central R. Co.*, 342 U.S. 890 (1951).**

None of the four cases cited by the Commission and the United States supports their request for remand.

In *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) the case before this Court had

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* *I.C.C.* v. *New York Central R. Co.*, *supra*, Brief in Opposition to Motion to Affirm, pp. 2-8.

** The reference on page 18 of the brief for the United States to a remand in the *Ex-Lake Grain* case must have been inadvertent, for there was no remand. The District Court set aside the Commission's order without remand, and this Court affirmed without remand.

originally commenced in a court and had never been before the Commission. In that remand case it was obvious that the doctrine of primary jurisdiction was applicable.

In contrast to the *Texas & Pacific* case, *Illinois Commerce Comm'n* v. *United States*, 292 U.S. 474 (1934), concerned an issue of fact which had been initially submitted to the I.C.C. and which had been decided. This Court upheld the Commission's decision without discussing either primary jurisdiction or remand.

Of course, when faced with an issue which has never been considered by or presented to the Commission a court must apply the doctrine of primary jurisdiction. Further, when exercising its reviewing function a court must accord due recognition to the administrative wisdom and expertise of the Commission, as the District Court did in the present case. But, however great the degree of deference to administrative wisdom, quasi-judicial decisions of administrative agencies must be permanently enjoined if, as a matter of law, the grounds upon which the issuing agency relied are invalid.

In the noted case of *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80 (1943), this Court determined that a reviewing court cannot exercise the quasi-legislative or purely discretionary functions of an administrative agency, saying (*Id.* at 88):

> "If an order is valid *only* as a determination of *policy or judgment* which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service

for an administrative judgment." (Emphasis supplied.)

The decision in *Chenery* reflected the inability of the federal courts to exercise the delegated legislative authority of Congress. The present case does not involve the rule-making or quasi-legislative power of the Commission but the quasi-judicial power to declare acts of carriers lawful or unlawful. Neither the holding nor the rationale of *Chenery* applies.

The decision of this Court in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962) is distinguishable for the same reason. That case involved the discretionary power of the Commission to issue or revoke certificates of public convenience and necessity to operate a motor carrier as a means of remedying unlawful discrimination.

Remand of this case for a third proceeding before the Commission would accomplish nothing except inexcusable delay and further impoverishment of Appellee Railroads already suffering from a seven year wait for a decision which the Act, in Section 15(7), commands to be made "as speedily as possible".

B. The Commission's Misapplication of Section 3(1) Was an Error of Law, and Remand to the Commission is Neither Necessary Nor Warranted.

All the Appellants evidently agree that the question presented under Section 3(1) is now ripe for decision by this Court. None of them even suggests the possibility of remand of the issue under Section 3(1).

Only the brief of the United States, technically an Appellee, suggests such a remand. The reasons ad-

vanced are contradicted by the forceful analysis in the same brief of the absence of rational basis for the decision of the Commission. The impact of that analysis is actually heightened by the contrasting lack of substance in the plea for remand. This is easily demonstrated by brief reference to the five categories of considerations suggested in the brief (Br. pp. 41-43) as making remand to the Commission appropriate.

1. The brief suggests that on remand the Commission explain why it gave controlling effect to distance in contrast with the practice in all other cases. The answer is plain. It needs no further explanation from the Commission. The Commission made a mistake of law. There is no need to have the Commission explain why it thought the law forbade the equality of rates. The question is whether this is or is not the law, and that is a question for this Court.

2. The United States suggests that the Commission deal further with cost of service and explain why it has any relevance. In the case of export-import rates involving interior territory, factors of distance and cost have universally been subordinated to the basic competitive principle of rail-ocean equalization. Costs, like distance, have never been the criteria of lawfulness under Section 3(1). Here again, there is no need to have the Commission explain why it thought the law was otherwise. Its conclusion of law is clear, and it is wrong. The District Court was right and should be affirmed.

3. The next task suggested for the Commission on remand relates to ports, not railroads. It is suggested

that since the Commission gave weight to the "inherent competitive advantages of New York" it might explain what competitive advantages the other Northern Tier Ports have and what their connection is with the conclusions of the Commission. This is just one more instance of Commission reliance on irrelevancies in deciding the question of lawfulness under Section 3(1). One needs only to turn back to page 36 of the same brief to find agreement by the United States that it is not the function of railroad rates to interfere with the opportunity of a port to realize its own advantages, whether they result from natural endowments or commercial preferment. No useful purpose would be served by having the Commission explain why it chose to rest its determination of law on an admittedly irrelevant consideration.

4. In a crescendo of self-contradiction, the brief suggests (p. 43) that the Commission deal further on remand with the possible threat of a rate war. The brief had just said two pages earlier (p. 41) that even assuming the proposed rate reductions would precipitate a rate war "this factor should have been irrelevant to its determination of undue preference and prejudice," and five pages earlier (pp. 38-39) that the Commission erred if it placed any reliance upon the threat of a rate war in reaching its conclusion of undue preference and prejudice.

5. Finally, the brief suggests (p. 43) that the Commission comb through the entire Interstate Commerce Act to see whether there are any other provisions that are pertinent to the lawfulness of the rate reductions.

This is a suggestion that the case now go back for a third set of Commission proceedings to see if anyone can think of any new legal arguments. This seems peculiarly inappropriate after two sets of proceedings before the Commission followed by these judicial proceedings, spanning almost seven years. There were more than forty parties or intervenors arrayed on one side or the other of this case. It seems to be an exercise in futility to suggest remand just in case someone forgot something.

This is no less than suggesting that remand be automatic in every appeal involving the Interstate Commerce Commission. Under such a rule all contested rate proposals would remain pending in perpetuity.*

The cogency of the brief for the United States in demonstrating the absence of rational basis for the decision of the Commission is striking. Its labored effort to provide the Commission with still another chance to explain how it happened to fall into such error may be commended as deferential consideration for our oldest Federal agency but would serve no useful purpose. Curiosity alone would be satisfied by a remand for explanation by the Commission as to which

* The United States refers to one legal argument by which, if valid, Appellees themselves could buttress their position on remand. It refers to the cases holding that Section 3(1) could not apply to the proposed rate reductions of any Northern Tier carrier which does not serve the Southern Tier Ports. This would be an additional reason why Section 3(1) as a matter of law did not bar the rate reductions proposed by Appellees. Since the District Court correctly held there was no rational basis for the decision of the Commission that the proposed equalizing rates were unlawful, a remand to deal with this additional reason would be academic. *Texas & Pac. Ry. Co. v. United States*, 289 U.S. 627 (1933); *New York v. United States*, 331 U.S. 284 (1947); *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573 (1949).

of the various irrelevancies on which it relied influenced it the most.*

To remand for purposeless explanations which could not change the substantive disposition of this case would be a grave injustice to the Appellees. Even with an opportunity to compete on the basis of equality, Appellee Railroads will be hard pressed to attract additional traffic for some time to come in view of the superior facilities at the Southern Tier Ports for handling bulk commodities (R. 3769). Extensive new facilities will be necessary before even a beginning can be made (R. 3769).

A remand would seriously injure Appellee Railroads. The equalizing rate reductions were proposed in June, 1956. After almost seven years the rates are still not in effect even though the reviewing court has unanimously held them lawful in every respect. During this entire time Appellant Railroads have continued to maintain their near monopoly on the high-volume bulk cargo held by the Commission itself to be essential to a healthy port economy (R. 3754).

* Even cases cited by the United States illustrate the uniformity with which this Court has set aside, without remand, quasi-judicial decisions of the Interstate Commerce Commission lacking a rational basis. *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454 (1935); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935); *Florida* v. *United States*, 282 U.S. 194 (1931). In the other cases cited by the United States the problem was different. In *Eastern Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194 (1944) and *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954) the Court pointed out that the Commission had overlooked novel questions never before considered by it and remanded to give the Commission an opportunity to express its views for the first time. In *New York C. R. Co.* v. *United States*, 207 F. Supp. 483 (S. D. N. Y. 1962) the initial reviewing court was unable to determine from the report of the Commission whether there was or was not a rational basis for its decision. Here the District Court could and did determine that there was no rational basis for the decision. Its reversal without remand followed the practice approved by this Court.

Delays in the resolution of rate controversies can be serious cause for alarm. However pressing a railroad management may consider the need for a rate change, however burdensome an inequality may exist, a competitor has less and less need of persuasive facts or legal precedents to defeat the change. By obtaining suspension of rates the adversary can maintain the *status quo* by merely keeping the proceedings going indefinitely.*

This case is by no means the first time that equalization of rail-ocean rates has been effectively thwarted by such delays. A similar controversy, involving equalization of rates on import iron ore, is now entering its second decade with no end in sight.** Having had a

* Although expressly authorized to suspend rates for no longer than seven months, the power of the Commission to deny relief on some subsidiary technical point can as a practical matter force indefinite suspension. The purely incidental "Fourth Section" point in this case is of that nature. The point is technically in the case, but no one argues about it because all realize that it has no real bearing on the merits of the controversy.

** *Iron Ore From Eastern Ports To Central Freight Association Points*, 299 I.C.C. 195 (1956); *modifying in part* 291 I.C.C. 527 (1954), *aff'd in part on reopening*, 300 I.C.C. 102 (1957), *aff'd in part sub nom., Boston and Maine R. R. v. United States*, 153 F. Supp. 952 (D. Mass. 1957), *rev'd in part and remanded sub nom., Baltimore & O. R. Co. v. United States*, 151 F. Supp. 258 (D. Md. 1957), *rev'd in part and remanded sub nom., I.C.C. v. Baltimore & O. R. Co.*, 355 U.S. 175 (1957), *motion to clarify denied*, 356 U.S. 970 (1958):

Iron Ore From Eastern Ports To Central Freight Association Points, 314 I.C.C. 149 (1961), *on remand and aff'g., Iron Ore Ex-Labrador, Canada to Youngstown, Ohio*, 302 I.C.C. 109 (1957), *rev'd and remanded in part sub nom., New York C. R. Co. v. United States*, 207 F. Supp. 483 (S.D.N.Y. 1962), *motion for change of venue denied*, 200 F. Supp. 944 (S.D.N.Y. 1961), *rev'd and remanded in part sub nom., Baltimore & O. R. Co. v. United States*, 212 F. Supp. 13 (D. Md. 1962).

managerial decision of first importance blocked for ten years, the New York Central still faces the future with uncertainty as to when, if ever, the issue will be resolved.

In a case of this kind presenting a question of high legal principle—equality or inequality—someone is basically right and someone basically wrong. The side that is wrong should not be enabled to prevail by the sheer delay of unnecessary remands for clarification of details after the basic rights and obligations have become clear.

CONCLUSION

The judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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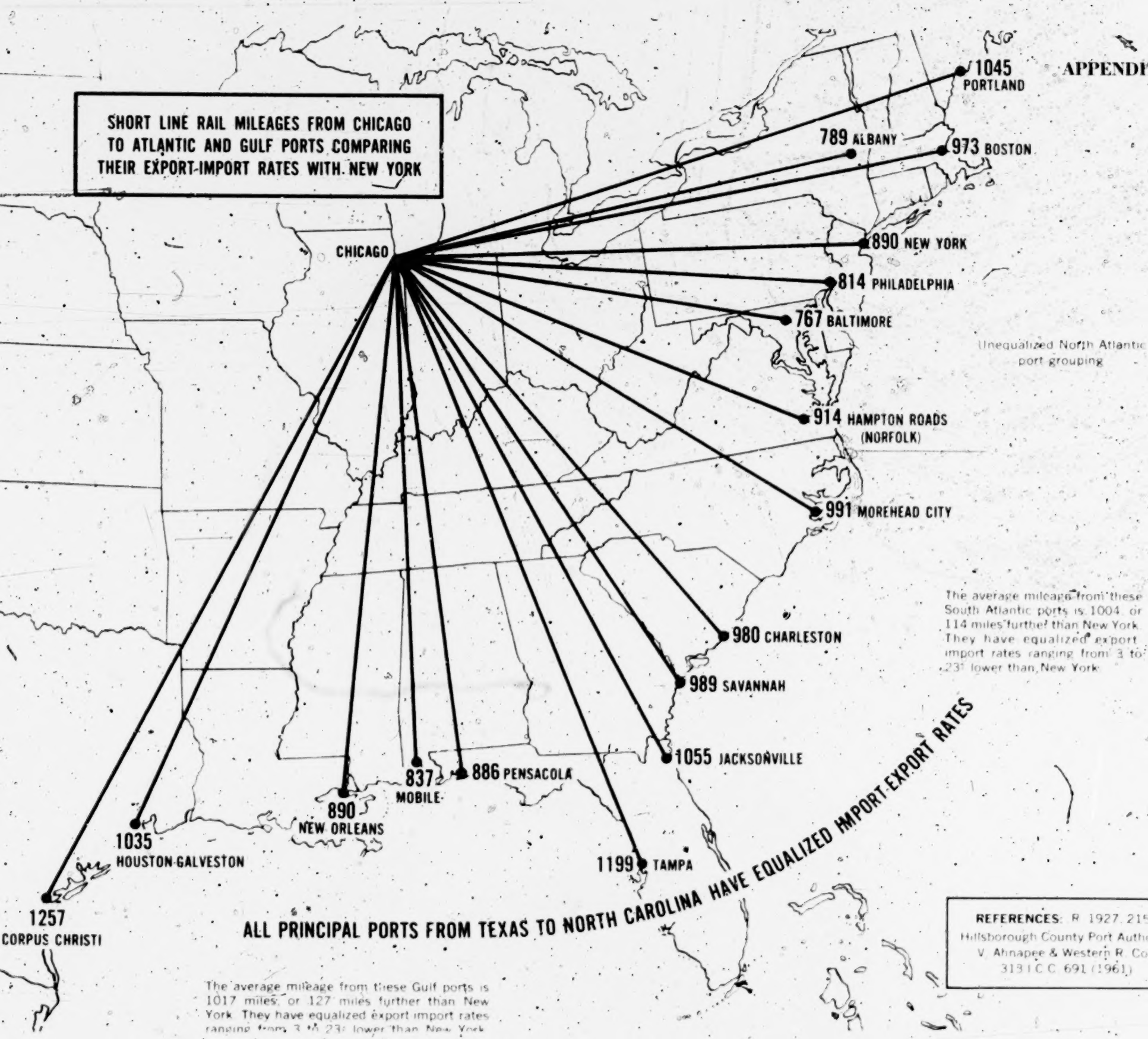
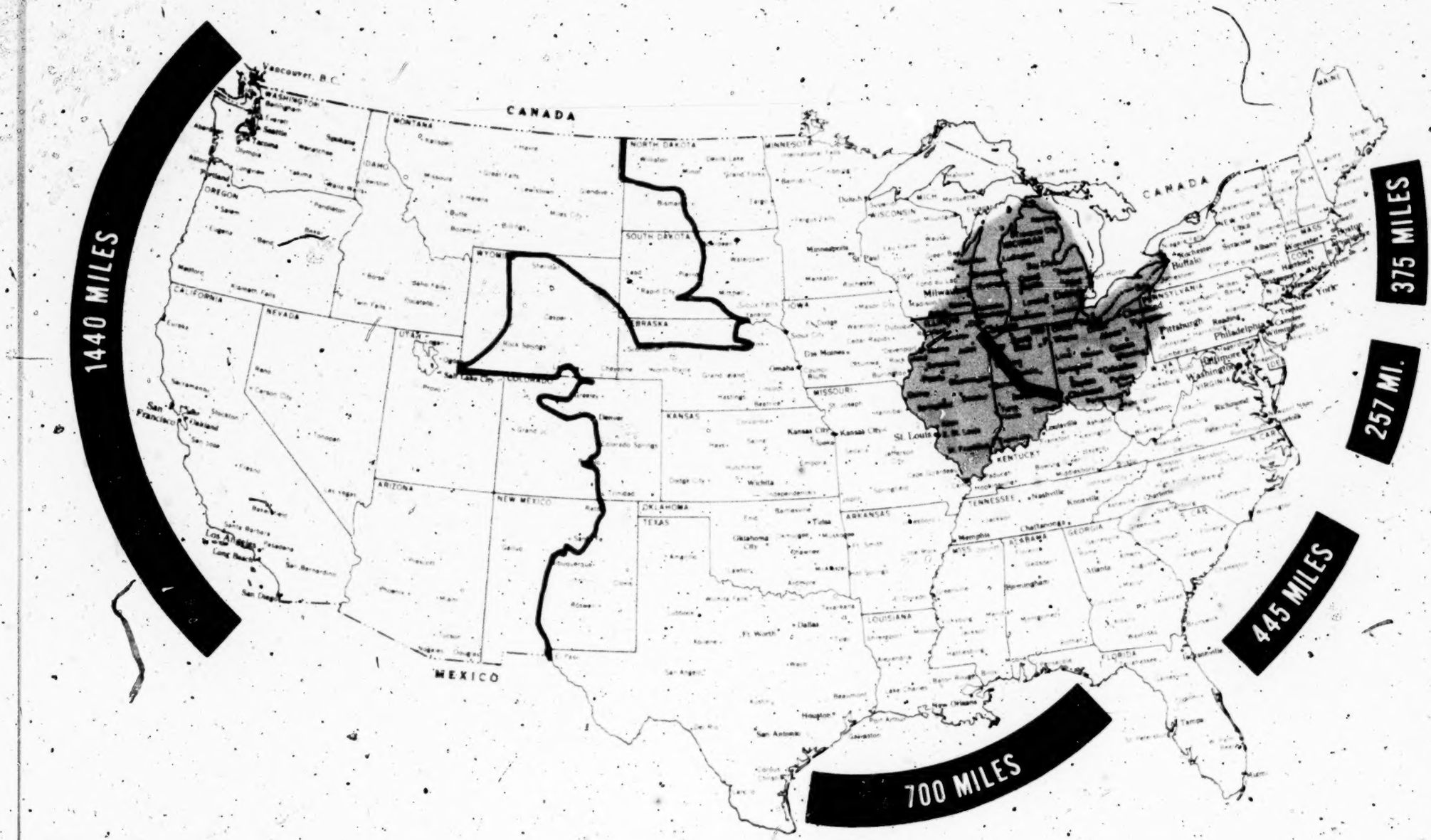

SHORT LINE RAIL MILEAGES FROM CHICAGO TO ATLANTIC AND GULF PORTS COMPARING THEIR EXPORT-IMPORT RATES WITH NEW YORK
CHICAGO
1045 PORTLAND
789 ALBANY
973 BOSTON
890 NEW YORK
814 PHILADELPHIA
767 BALTIMORE
914 HAMPTON ROADS (NORFOLK)
991 MOREHEAD CITY
980 CHARLESTON
989 SAVANNAH
1055 JACKSONVILLE
886 PENSACOLA
837 MOBILE
890 NEW ORLEANS
1035 HOUSTON-GALVESTON
1199 TAMPA
1257 CORPUS CHRISTI
Unequalized North Atlantic port grouping
The average mileage from these South Atlantic ports is 1004 or 114 miles further than New York. They have equalized export import rates ranging from 3 to 23¢ lower than New York.
ALL PRINCIPAL PORTS FROM TEXAS TO NORTH CAROLINA HAVE EQUALIZED IMPORT-EXPORT RATES
The average mileage from these Gulf ports is 1017 miles, or 127 miles further than New York. They have equalized export import rates ranging from 3 to 23¢ lower than New York
REFERENCES: R 1927, 215
Hillsborough County Port Auth
V. Ahnapee & Western R. Co
313 I.C.C. 691 (1961)

Exhibit No.
I & S 6615
Witness E



1440 MILES

Map portraying tory of the Unite solid red line fr import rates are all. Pacific Coa British Columbia a range of approx

700 MILES

From and to the and import rates Ports from Corp City, Florida, a miles and to an ports extending Morehead City, approximately 4 import rates ap east of the Mon export rates are Atlantic and Gu

257 MILES

To and from the rates lower than the North Atla Roads to Phila proximately 25 apply in the Nor York, New York mately 375 mile Portland, Maine

Exhibit No. 17 (X-1)
I & S 6615
Witness EDWARD K. LAUX

1440 MILES

Map portraying origin and destination territory of the United States located east of the solid red line from and to which export and import rates are on an equality to and from all Pacific Coast ports from Vancouver, British Columbia to San Diego, California, a range of approximately 1440 miles.

700 MILES 445 MILES

From and to the shaded area equalized export and import rates apply to and from the Gulf Ports from Corpus Christi, Texas to Panama City, Florida, a range of approximately 700 miles and to and from the South Atlantic ports extending from Jacksonville, Florida to Morehead City, North Carolina, a range of approximately 445 miles, equalized export-import rates apply, except that from points east of the Monon Line (Black Line) only export rates are equalized and only to South Atlantic and Gulf Ports, Louisiana and east.

257 MILES 375 MILES

To and from the shaded area, export-import rates lower than New York apply to ports in the North Atlantic range from Hampton Roads to Philadelphia, Pennsylvania, approximately 257 miles, and highest rates apply in the North Atlantic range from New

APPENDIX C

In their briefs, Appellants cite certain decisions of the Interstate Commerce Commission as authority for continuation of the existing rail differentials. Those decisions do not support their position.

1. *Decisions Before 1935 in Proceedings Concerning the North Atlantic Ports*

Prior to complete equalization in 1935 of the ocean rates to and from the North Atlantic ports, various port interests from time to time complained that the rail differentials were unjust and unduly prejudicial to them. After their attempts to obtain abolition or modification of the differentials were rejected by the railroads, those interests complained to the Commission and commenced proceedings for orders by the Commission compelling the railroads to abolish or modify the differential adjustment.

New York port interests did so on two occasions. *N.Y. Produce Exchange* v. *B. & O. R. Co.*, 7 I.C.C. 612 (1898); *Chamber of Commerce of N.Y.* v. *N.Y.C. & H.R.R. Co.*, 24 I.C.C. 55, 674 (1912) *aff'd* 27 I.C.C. 238 (1913). In both proceedings, despite claims that differences in ocean rates had disappeared, the Commission refused to compel the railroads to eliminate or change the rail differentials. In the *Produce Exchange* case the Commission found that although ocean rates of cargo lots had become virtually equal at the ports of New York, Baltimore and Philadelphia, New York still had a substantial ocean rate advantage as to freight carried in less than full cargo lots. The Com-

mission also found that fluctuations in ocean rates for less than cargo lots were very great. In a decision the following year, rendered upon the completion of an investigation undertaken by the Commission on its own motion, the Commission made somewhat different findings. The Commission found that ocean rates at that time varied substantially, often from day to day. It also found that New York and Boston had lower ocean rates than the other North Atlantic ports and in so doing it drew no distinction between cargo and less than cargo lots. *Export and Domestic Rates*, 8 I.C.C. 214, 227, 231 (1899).

In 1905 the Commission found that New York and Boston continued to enjoy lower ocean rates than the other North Atlantic ports. *In the Matter of Differential Rates*, 11 I.C.C. 13 (1905). This landmark advisory opinion gave emphatic recognition to rail-ocean equalization as a basic principle underlying export-import rates.

In 1912 New York port interests again tried without success to convince the Commission that the rail differentials should be eliminated. The Commission found that New York still enjoyed lower ocean rates although they were volatile and fluctuating in nature. In a related contemporaneous proceeding, involving import rates through the Port of Boston, the Commission ruled that Boston was not entitled to a level of import rates lower than those from New York to the Affected Territory. Thus the Commission held that Boston's inability to compete with New York on a basis of *equal* rail and ocean rates did not entitle the Boston port to lower rates since the rail distances from

Boston were greater than those from New York, despite higher terminal costs at New York. *Chamber of Commerce of N.Y.* v. *N.Y.C. & H.R.R. Co., supra; In the Matter of Import Rates*, 24 I.C.C. 78, 678 (1912), *aff'd* 27 I.C.C. 245 (1913).

Subsequently the Boston port interests tried again. In the second Boston proceeding, Boston requested equality of rates with Philadelphia and Baltimore. There Boston argued that the United States Shipping Board's policy was one of uniformity of ocean rates at all North Atlantic ports. The Commission however found that policy to be of recent vintage, and it did *not* find that ocean rates had in fact been equalized. *Maritime Ass'n. of Boston Chamber of Commerce* v. *A.A.R. Co.*, 95 I.C.C. 539 (1925), *aff'd* 126 I.C.C. 199 (1927).

Baltimore port interests also attempted to compel changes in the rail differentials. *Baltimore Chamber of Commerce* v. *A.A.R. Co.*, 159 I.C.C. 691 (1929). In that proceeding, the Commission refused to compel the rail carriers to *increase* the differentials in favor of Baltimore from 3¢ to 6¢, rejecting a strict distance formula while emphasing the national interest in carrier competition.

In a somewhat different vein, New Jersey port interests also complained to the Commission about the differentials. Those interests complained that the railroads serving the Port of New York were absorbing the expense of lighterage from the New Jersey side of the port to the New York side of the port. The complainants sought differentially lower rail rates for the New Jersey side of the port. The complaint was dismissed. *Lighterage Cases*, 203 I.C.C. 481 (1934).

2. *Decisions after 1935 in Proceedings Concerning the North Atlantic Ports*

In 1936, shortly after equalization of ocean rates to the North Atlantic ports was completed, port interests in Albany complained that the railroads had not established export rates from the Affected Territory to Albany. Since Albany had not previously been accorded the status of a port, it had had no place in the existing rate structure relating to export rail and ocean transportation. The Commission found that the failure of the railroads to establish export rates to Albany constituted a violation of Section 3(1). Taking into consideration the fact that the mileage from Albany to the Affected Territory was approximately equal to that from Philadephia, the Commission set the new export rates on the Philadelphia basis. The Commission did not consider or even discuss the ocean rates at Albany.

The Albany port interests at that time were apparently satisfied with the level of rail rates the Commission fixed. No real issue was raised as to the level of export rail rates vis-a-vis the other North Atlantic ports. The issue was whether Albany would obtain export rates at all. *Albany Port Dist.* v. *A. & W. Ry. Co.*, 219 I.C.C. 151 (1936).

Two years later the City of Philadelphia failed to obtain levels of rates from and to the Affected Territory equal to those at Baltimore, Norfolk, the South Atlantic and the Gulf ports. In that proceeding, Philadelphia expressly disclaimed any wish to have the rail differentials disturbed insofar as they concerned New York and other Northern Tier ports. The Com-

mission disposed of the Philadelphia complaint with respect to Norfolk and the South Atlantic and Gulf ports by finding that the group of carriers controlling the rates to Norfolk, and ports south, did not control the rates to Philadelphia. The Commission found a lack of proof as to Baltimore arising from the fact that virtually no evidence had been presented to the Commission with respect to the Baltimore situation. Philadelphia's main thrust had been directed at the rates of the more southerly ports. *City of Philadelphia* v. *B. & O. R. Co.*, 231 I.C.C. 21 (1938).

In 1941 interests located on the New Jersey side of the Port of New York again attempted to obtain rail rates, differentially lower than those which applied to the New York side of the port. Again those interests contended that costly lighterage service to the New York side of the port entitled them to lower rates on the New Jersey side. The proceeding was nothing more than a re-trial of the *Lighterage Cases, supra.* The result was the same and the complaint was dismissed. *State of New Jersey* v. *B. & O. R. Co.*, 245 I.C.C. 581 (1941).

Also in 1941, the Port of New York complained that its export rates from Buffalo on export grain, which had arrived there via the Great Lakes, were higher than those to Philadelphia and Baltimore. The Commission dismissed the complaint stating that New York still had some ocean rate advantages with respect to parcel lot shipments of grain. *Port of New York Authority* v. *B. & O. R. Co.*, 248 I.C.C. 165 (1941). That case did not involve the Affected Territory. In 1949, however, the railroads voluntarily sought to abolish

the differentials on this export grain from Buffalo. The District Court, affirmed by this Court, sustained the right of the railroads to make the change in the *Ex-Lake Grain* cases discussed at pp. 49-51 of this brief.

3. *Decisions in Proceedings Concerning Ports in Other Coastal Areas*

During the 1920s interests at Galveston, Texas convinced the Commission that the Port of Galveston was entitled to rates differentially lower than rates at New Orleans, because of shorter rail distances to Galveston. *Galveston Commercial Ass'n* v. *G., H. & S. A. Ry.*, 100 I.C.C. 110 (1925) *mod.* 128 I.C.C. 349 (1927) *mod.* 160 I.C.C. 345 (1929) *aff'd sub nom.*, *Texas & P. R. Co.* v. *United States*, 42 F.2d 281 (S.D. Tex. 1930). This Court reversed that decision in *Texas & P. R. Co.* v. *United States*, 289 U. S. 627 (1933). This decision is discussed at pp. 35-37 of this brief.

As authority for their proposition that equalization is unlawful when it results from a disregard of distance, the Appellants also cite a number of Commission decisions rendered in the early 1940s and early 1950s concerning ports on the Texas Gulf coast and the City of Tampa on the Florida Gulf coast. *Nueces County Nav. Dist.* v. *A. & S. Ry. Co.*, 251 I.C.C. 115 (1942), *mod.* 253 I.C.C. 99 (1942), *mod.* 253 I.C.C. 745 (1942); *Port Comm'n. of City of Beaumont, Tex.* v. *A. & S. R. Co.*, 251 I.C.C. 137 (1942), *mod.* 253 I.C.C. 127 (1942), *mod.* 253 I.C.C. 753 (1942); *Tampa Traffic Ass'n* v. *A. & R.R. Co.*, 272 I.C.C. 217 (1948), *aff'd*, 281 I.C.C. 483 (1951), *aff'd on rearg.* 286 I.C.C. 455 (1952); *aff'd sub*

nom. Tampa Traffic Ass'n v. United States, 132 F. Supp. 948 (S.D. Fla. 1955). Those decisions do not support Appellants' position.

In the *Nueces County* proceeding, the Commission compelled equalization of Corpus Christi with the other Texas ports with respect to export-import rates from and to Central Territory. The only action of the Commission limiting port equalization and declining to grant the relief sought by the complainant concerned rates to and from interior areas in Southwest and Western Trunk Line Territories since those interior areas were hinterlands of other ports. The *Beaumont* proceeding was concerned solely with export-import rates between Texas ports and points in Southwest and Western Trunk Line Territories. Unlike *Nueces County* it did not concern rates to and from Central Territory. Again hinterlands were involved in those instances where the Commission placed limitations on the degree of equalization of Beaumont with other Texas ports.

The *Tampa Traffic Association* decisions cited by Appellants were concerned with export-import rates between that port and portions of Central Territory. The Commission in those cases dismissed the complaint of Tampa seeking equalization and its action was sustained by the Federal District Court. However, these decisions have recently been overruled and Tampa is now equalized with other Gulf and South Atlantic ports as to traffic to and from Central Territory. *Hillsborough County Port Authority v. A. & W. Ry. Co.*, 313 I.C.C. 691 (1961), *aff'd per curiam sub nom. Ala-*

bama, T. & N.R. Co. v. *United States*, 207 F. Supp. 638 (S.D. Ala. 1962.)*

Finally, Appellants rely on *City of Wilmington* v. *A.G.S.R. Co.*, Docket No. 33247 (Div. 2, 1962.) There the Commission was concerned with the legality of existing equalized rates on export and import traffic between points in interior Southern Territory and Morehead City and Wilmington, North Carolina. The Commission found that equalized rates at Morehead City which disregarded distance advantages of Wilmington in excess of 25% were unduly preferential of Morehead City and unduly prejudicial to Wilmington. Other South Atlantic port relationships were disposed of in similar fashion. The Wilmington case, which is pending on review by the full Commission and not yet final, did not deal with Central Territory but was concerned only with hinterland territories.

* The Commission has also extended equalization to Corpus Christi, Texas. In *Nueces County Nav. Dist.* v. *A., T. & S. F. Ry. Co.*, 315 I.C.C. 155 (1961), the Commission directed the defendant railroads to equalize Corpus Christi with other Texas ports as to export rates on grain and grain products from points in the Southwest Territory. The distance advantages of other Texas ports exceeded 32%.